

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
MELINTA THERAPEUTICS, INC., Case No. 19-12748 (LSS)
et al.,
Courtroom No. 2
824 North Market Street
Wilmington, Delaware 19801
Debtors. January 28, 2020
1:30 P.M.

TRANSCRIPT OF SECOND DAY MOTIONS
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: David R. Hurst, Esquire
MCDERMOTT WILL & EMERY LLP
The Nemours Building
1007 North Orange Street, 4th Floor
Wilmington, Delaware 19801

- and -

Joseph O. Larkin, Esquire
SKADDEN ARPS SLATE MEAGHER & FLOM
920 North King Street
Wilmington, Delaware 19801

Audio Operator: Electronically Recorded
by Sherry Stiles & Brandon McCarthy

Transcription Company: Reliable
1007 N. Orange Street
Wilmington, Delaware 19801
(302) 654-8080
Email: gmatthews@reliable-co.com

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

APPEARANCES (Continued):

For the Debtors: Ron E. Meisler, Esquire
Albert L. Hogan, III, Esquire
Christopher M. Dressel, Esquire
SKADDEN ARPS SLATE MEAGHER & FLOM
155 North Wacker Drive
Chicago, Illinois 60606

For Vatera: Gregg Galardi, Esquire
ROPES & GRAY LLP
920 North King Street, Suite 700
Wilmington, Delaware 19801

For the U.S. Trustee: Linda Richenderfer, Esquire
UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE UNITED STATES TRUSTEE
844 King Street, Suite 2207
Lockbox 35
Wilmington, Delaware 19801

For the Committee: Rachel A. Parisi, Esquire
Warren J. Martin, Jr., Esquire
PORZIO BROMBERG & NEWMAN P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962

For Deerfield: Adam G. Landis, Esquire
LANDIS RATH & COBB LLP
919 N. Market Street, Suite 1800
Wilmington, Delaware 19801

- and -

James L. Bromley, Esquire
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004

SECOND DAY MOTIONS:

Wages Motion. Motion of Debtors for Entry of Interim and Final Orders Authorizing Debtors to Pay Prepetition Wages, Compensation, and Employee Benefits (Filed December 27, 2019) [Docket No. 11]

Ruling: 46

Bidding Procedures. Motion of Debtors for Orders (I) (A) Establishing Bidding Procedures; (B) Approving Expense Reimbursement; (C) Establishing Procedures Relating to the Assumption or Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, Including Notice of Proposed Cure Amounts; (D) Approving Form and Manner of Notice of All Procedures, Protections, Schedules, and Agreements; (E) Scheduling a Hearing to Consider any Proposed Sale; and (F) Granting Certain Related Relief; and (II) (A) Approving any Sale of Substantially All of Debtors' Assets and (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sale; and (C) Granting Related Relief or, in the Alternative (III) (A) Authorizing Debtors' Assumption of Restructuring Support Agreement and (B) Granting Related Relief (Filed December 30, 2019) [Docket No. 67]

KEIP Motion. Motion of Debtors for Entry of an Order Approving the Implementation of the Debtors' Key Employee Incentive Plan (Filed January 3, 2020) [Docket No. 92 (Sealed); Docket No. 93 (Redacted)]

Ruling: 212

DEBTORS' WITNESS(s)

Jeffrey Finger

Cross-examination by Mr. Martin	54
Cross-examination by Mr. Galardi	57
Redirect examination by Mr. Hogan	63
Re-cross examination by Mr. Martin	68
Re-cross examination by Mr. Galardi	70
Redirect examination by Mr. Hogan	74
Direct examination by Mr. Bromley	75
Cross examination by Mr. Galardi	81

1 Cross examination by Mr. Martin 82

2

Peter Milligan

3

Cross examination by Mr. Martin 83

4

Cross examination by Mr. Bromley 93

5

Redirect examination by Mr. Hogan 101

6

Re-cross examination by Mr. Martin 102

7

Re-cross examination by Mr. Galardi 104

8

9

David Gill

10

Cross examination by Ms. Parisi 197

11

EXHIBITS:

ID

Rec'd

12

Declaration of Peter Milligan

24

13

Declaration of Jeffrey Finger

50

14

Declaration of David Gill

195

15

Dempsey Declaration

203

16

17

18

19

20

21

22

23

24

25

1 (Proceedings commenced at 11:06 a.m.)

2 THE CLERK: Please rise.

3 THE COURT: Please be seated.

4 MR. HURST: Good afternoon, Your Honor.

5 THE COURT: Mr. Hurst.

6 MR. HURST: For the record David Hurst from
7 McDermott Will & Emery representing Melinta Therapeutics and
8 its debtor affiliates, the debtors and debtors-in-possession
9 in these cases.

10 Your Honor, thank you for the brief adjournment to
11 allow the parties to work through some issues. You can tell
12 from the length of the agenda that there are many issues.
13 So, we appreciate your indulgence.

14 Your Honor, with me from the company today we have
15 four representatives from the senior management and the
16 board. First I want to introduce Mr. David Gill, he is our
17 chairman of the board. Jennifer Sanfilippo is our interim
18 chief executive officer. Peter Milligan, our chief financial
19 officer. Susan Blum, back here, the chief accounting
20 officer.

21 THE COURT: Welcome.

22 MR. HURST: Then at counsel table with me, Your
23 Honor, Ron Meisler, Chris Dressel, and Al Hogan, and many
24 others that are supporting the efforts.

25 Unless Your Honor has any initial questions from

1 me I propose to turn over the podium to Mr. Meisler who will
2 discuss how we proceed to move forward today.

3 THE COURT: That's fine.

4 MR. HURST: Okay. Thank you, Your Honor.

5 THE COURT: Mr. Meisler?

6 MR. MEISLER: Good afternoon, Your Honor.

7 THE COURT: Good afternoon.

8 MR. MEISLER: Ron Meisler of Skadden Arps on
9 behalf of the debtors, Melinta Therapeutics, and its
10 subsidiaries.

11 Thank you, Your Honor, for making time for us this
12 afternoon particularly in light of our lengthy agenda. Your
13 Honor, before we get into the agenda items I'd like to
14 provide for the court a brief status update.

15 Your Honor, on January 14th of this year the
16 committee was appointed, the official creditors committee,
17 and shortly thereafter the committee selected Porzio and
18 Morris James as legal advisors, and FTI as its financial
19 advisor.

20 While unfortunately we have been unable to resolve
21 all the open issues with the committee in advance of this
22 afternoon's hearing we have been working constructively to
23 provide the committee with access to requested diligence. We
24 have been keeping an open line of dialog between us, and the
25 committee and what may be our largest creditor Vatera. And

1 to that end, Your Honor, we held in-person meeting in
2 Morristown, New Jersey this past Friday with the creditors
3 committee, and the members of the creditors committee, and
4 we'd like to believe that we really made a lot of progress
5 both getting to know one another and providing the
6 transparency that we all want as part of the Chapter 11
7 process.

8 We are committed, Your Honor, to continuing that
9 effort to work constructively with the committee and with
10 Vatera. And we're going to make sure that there's sufficient
11 information for the committee to fulfill its statutory
12 duties. And I would hope that Mr. Martin, Warren Martin, of
13 Porzio would agree that we have really stretched out our arm
14 to make sure that they have what they need.

15 As a result of these efforts, Your Honor, we were
16 able to resolve the committee's objection to the employee
17 motion. It's not going forward on an uncontested basis
18 because the U.S. Trustee still does have an objection, but it
19 is important to note that following our meeting on Friday the
20 committee does understand the importance of the work force to
21 the company and to the value maximization process that we
22 need to run here. We'll get into that more as we talk about
23 the employee wages motion.

24 Your Honor, on January 17th, in accordance with
25 the RSA milestone, the debtors filed their plan and

1 disclosure statement, and the motion seeking approval of the
2 disclosure statement. The disclosure statement is currently
3 set for an approval hearing on February 21st. The plan, as
4 drafted, contains substantial flexibility for what might
5 happen as part of our marketing process and our hoped for
6 auction.

7 So, Your Honor, we're before you today seeking to
8 take our next steps in the life of a Chapter 11 debtor which,
9 among other things, as mentioned, includes the approval of
10 employee wages and the other value maximizing steps we need
11 to take including seeking approval of our marketing process,
12 of our bid procedures, of cash collateral, among other
13 things.

14 Your Honor, you're going to hear, of course, from
15 committee's counsel and from Vatera regarding their
16 objections, there are many of them, and we think it's
17 important to keep a few things in mind. Your Honor, we have
18 been marketing this business in earnest with the help of
19 Jeffries for nearly 100 days prepetition. Even before that
20 the company had started its own marketing process to test the
21 market for bidders.

22 So, we have been working hard to find a buyer and
23 we hope that as part of our process we will get bidders and
24 we believe that as part of that auction we hope that we will
25 drive up value. The critical piece is to get bidders to

1 submit qualified bids and to move forward at auction.

2 Your Honor, we have a highly engaged and motivated
3 board and management team as you see with who has come here
4 to court today. They have been working tirelessly to do what
5 is right for the company, to evaluate offers, to respond to
6 diligence requests, to meet with potential buyers and to move
7 the transaction process forward as expeditiously as possible.

8 Your Honor, we have an agreement with Deerfield,
9 our secured lender, that provides the company with an
10 executable path out of Chapter 11. It provides for the
11 payment in full of administrative claims, priority claims,
12 cure, it preserves jobs and it expressly contemplates a fair
13 and open process for the solicitation of higher or better
14 bids.

15 Your Honor, I want to take a moment to comment
16 that we're so often in front of Delaware Courts in a 363
17 process. The bid that we have on the table is so much better
18 than a 363 bid because it promises a confirmable plan. Your
19 Honor, for that reason we think it's a good bid and a great
20 floor bid.

21 Your Honor, we continue to face business
22 uncertainty and operational risk. And a prolonged stay in
23 Chapter 11, in our view, would not be conducive to value
24 maximization. As you know, we received a number of
25 objections from the committee, from the U.S. Trustee, and

1 Vatera. Notably, Vatera is a prolific writer and has cast
2 approximately a dozen objections to the company's requested
3 relief.

4 As noted, we've worked to resolve a number of
5 these issues in advance of this hearing. As mentioned, we
6 resolved the employee wages motion and will work at this
7 hearing to explain to Your Honor all the different reasons
8 why we think what we put in front of you is a reasonable
9 decision and satisfies business judgement, and the other
10 standards that we need to satisfy where applicable.

11 Your Honor, given that we have 21 matters up
12 today, of which 16 are contested, we have some concerns that
13 we have insufficient time to get through the entirety of the
14 agenda. For this reason we would like to propose that we
15 proceed in an order that differs from the agenda.

16 If I may approach, Your Honor, I have a sheet
17 setting forth our proposed ordering which in big picture
18 starts with the uncontested matters and then in progress of
19 priority starting with the wages motion.

20 THE COURT: Okay.

21 MR. MEISLER: Your Honor, if I may approach?

22 THE COURT: You may.

23 MR. MEISLER: Thank you, Your Honor.

24 MR. MEISLER: Your Honor, thank you for hearing me
25 this morning. Unless you have any further questions I

1 propose to cede the podium to Mr. Hurst who will address the
2 first of the uncontested matters.

3 THE COURT: Yes. I will hear the uncontested
4 matters first.

5 MR. HURST: Your Honor, David Hurst for the
6 debtors.

7 Your Honor, Agenda Item Number 1, the first in our
8 list, is the final approval of the tax motion. This was one
9 of our first day motions. Your Honor granted the relief
10 requested on an interim basis, we sent it out on notice, we
11 received some comments from the committee which we
12 incorporated into the language of the final order, and then
13 we filed the order under certification of counsel.

14 Your Honor didn't enter the order. So, I assumed
15 that you have questions or concerns. I'm happy to address
16 those.

17 THE COURT: I do have a question.

18 MR. HURST: Okay.

19 THE COURT: Paragraph 6, which shows the additions
20 that have been made. I'd like to understand the import of
21 Subparagraph (f), what that is directed to.

22 MR. HURST: Well, Your Honor, this language was
23 adopted at the request of the committee. So, I'm going to
24 suggest that perhaps committee counsel address the concern
25 that was meant to be addressed by the language.

1 THE COURT: That's fine.

2 MS. PARISI: Thank you, Your Honor; Rachel Parisi,
3 Porzio Bromberg & Newman, on behalf of the committee. I
4 apologize, we have a nice size binder here and I did not
5 include the redlines for the ones that we resolved. So, I
6 apologize, Your Honor.

7 We did request language that was incorporated and
8 we appreciate the efforts to get this across the finish line.
9 (f) we did include, I believe, in the -- that language is
10 included in most of the orders --

11 THE COURT: It is.

12 MS. PARISI: -- if not all. And I think its -- I
13 mean from our perspective, to the extent that there is any
14 payment or any rights provided under the order that were not
15 supposed to be provided we wanted to include a reservation
16 for the committee and the debtors to the extent that we
17 needed to somehow unwind or reverse a particular payment that
18 should not have been made pursuant to the order.

19 THE COURT: How does that work? So, I've entered
20 an order that permits a payment and that payment is made.
21 So, how does a third-party rely upon my order?

22 MS. PARISI: I don't think it was meant to, in any
23 way, contradict anything that would have been ordered by Your
24 Honor, but simply if a payment was made that was intended to
25 be made pursuant to the order, but the committee, let's say,

1 for example, doesn't believe that that payment was authorized
2 to be made pursuant to the terms of the order that the
3 committee has reserved its rights. It, perhaps, might not be
4 necessary because I think that right probably exists no
5 matter what, but we were being careful to include that
6 reservation.

7 THE COURT: Well, I think this whole paragraph is
8 unnecessary, but I see this in all kinds of orders. Here's
9 what this order doesn't do is basically is what this
10 paragraph says. Well, this order doesn't do a whole lot of
11 things, okay. It doesn't do what it doesn't do. But now
12 what we've added to this order is something that says even
13 when a payment has been made under this order there is no
14 waiver of rights to contest the validity, amount,
15 classification or priority with respect to a payment that's
16 been made. I don't understand that.

17 I don't understand how we could have something in
18 this order that says notwithstanding payment under this order
19 that -- if you're talking about a mistake was made, the
20 debtor meant to pay Party A and they paid Party B; we can
21 deal with that. I don't understand how this doesn't undo my
22 order. That is what I don't understand.

23 MS. PARISI: Your Honor, we can work to tweak the
24 language. That was not the intention of that particular
25 paragraph.

1 THE COURT: Okay. Well, when you look at it
2 compare it to Paragraph (b), okay, which deals with, I'll
3 call, the more typical reservation. I need to understand the
4 difference between those two and the import of it. I won't
5 sign it the way it's stated here.

6 MS. PARISI: Sure, Your Honor. I think that with
7 respect to (b) if we included -- I think (b) is with respect
8 to the debtors and any sort of admission on the debtors'
9 behalf. If the phrase "parties in interest" was included in
10 (b) I think the committee's concerns would be satisfied. I
11 think that if Your Honor would accept that change I think
12 that could be something that perhaps clarifies any sort of
13 issue with the language.

14 THE COURT: Okay. Speak with the debtor about
15 that.

16 MS. PARISI: Okay. Thank you, Your Honor.

17 MR. HURST: Thank you, Your Honor.

18 So, was that your only concern with respect to the
19 tax motion?

20 THE COURT: Yes. And that's my concern with
21 respect to the customer obligation motion --

22 MR. HURST: It was critical vendor and also
23 utility.

24 THE COURT: Yes. All four of those, same concern.

25 MR. HURST: Excellent. Well, we have taken care

1 of four. We will work with the committee to make sure that
2 we can resolve that issue, but I think maybe just adding that
3 the language, you know, including other parties in interest
4 in that Paragraph (b), 6(b), sounds like that will take care
5 of the issue.

6 THE COURT: Okay.

7 MR. HURST: All right, Your Honor. Well, that
8 takes us then to the bar date. So, let me see, the debtors
9 are seeking a bar date, Your Honor, of March 9th and are
10 proposing to serve the bar date materials by February 4th.
11 It's just a 34 day period within which the parties to receive
12 and then file their proofs of claim. We received some very
13 limited comments from the U.S. Trustee and incorporated those
14 comments into the proposed form of order and the exhibits.
15 We filed the agreed order under a certification of counsel.
16 Your Honor, I sense you have a concern.

17 THE COURT: Paragraph 13 of the order.

18 MR. HURST: Okay. I'm there.

19 THE COURT: So, the language "absent further order
20 of the court" I assume was put in to try to address the
21 concern that I raise with almost every motion requesting a
22 bar date. I am not going to take that compromise language.
23 So, the code says -- actually the rules say what happens if a
24 person doesn't file a claim by the bar date, and that is all
25 I am going to order. They are not forever barred and joined,

1 (a) is stricken. And adding the -- they're not forever
2 barred and enjoined from asserting a claim. And the language
3 would simply flip the burden to the movant from the debtor.
4 A party files a late filed claim, file your objection. If
5 you don't file an objection the claim is allowed.

6 So, it should read Any person or entity that is
7 required to file a proof of claim that doesn't go down to
8 (b), but check (b) against Rule 600 -- no, 3000 and whatever
9 which says the consequence of not filing a proof of claim
10 which I think is probably reflected here, but I didn't go
11 look at the rule. Not treated as a creditor, don't get to
12 vote.

13 MR. HURST: Sure.

14 THE COURT: Not automatically disallowed. It
15 doesn't say you can never raise a claim. It says what it
16 says. That is what I will approve.

17 MR. HURST: Okay.

18 THE COURT: Then your notices need to conform.

19 MR. HURST: Sure. We will conform that to the
20 rule and then change the notices. Then we will submit it
21 under certification of counsel.

22 THE COURT: Then I will sign it.

23 MR. HURST: Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. HURST: Okay. It looks like the next item up

1 is going to be our employee order and for that I will turn
2 over the podium to my colleagues from Skadden.

3 THE COURT: Thank you.

4 MR. HURST: Thank you, Your Honor.

5 MR. MEISLER: Thank you, Your Honor. For the
6 record Ron Meisler of Skadden Arps on behalf of the debtors.

7 Your Honor, the next item to push forward is the
8 debtors' wages motion which was filed at Docket Number 11.
9 Your Honor, as I mentioned in my introductory comments we
10 received two objections to this motion; one from the U.S.
11 Trustee and one from the committee.

12 Your Honor, this motion has particular
13 significance to the debtors because, candidly, it's the glue
14 to maintain the work force. Your Honor, we want to show that
15 the debtors support the work force. The employee wages
16 motion is all about supporting the work force and, Your
17 Honor, that's why we put it up to the very top of the agenda.

18 Your Honor, the committee's objection has been
19 resolved as noted in our statement that we filed yesterday at
20 Docket Number 191. For the record, Your Honor, the terms of
21 the settlement are that the debtors have agreed to adjourn
22 the request to pay commissions to what is referred as the
23 Baxdela sales employees. Those were a subset of the sales
24 force that were given notice and their last day is, I
25 believe, February 10th, but mid-February to be sure.

1 Again, it's that universe that received WARN
2 notices and are subject to the debtors reduction and force.
3 So, we will push that to a future date at a hearing
4 subsequently to be noticed by the debtors. And we will use
5 that time to work with the creditor's committee to see if we
6 can come to a consensual resolution with that subset of the
7 population. Of course, the committee's rights with respect
8 to those payments to the Baxdela sales employees are
9 reserved. As to the balance of the relief requested, Your
10 Honor, the committee supports the motion.

11 Your Honor, I'll pause for a moment in case Mr.
12 Martin has anything further to mention and, otherwise, I'll
13 continue.

14 THE COURT: Mr. Martin?

15 MR. MARTIN: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. MARTIN: My *pro hac* papers. Good morning.
18 Good afternoon.

19 THE COURT: Good afternoon.

20 MR. MARTIN: I think I have *pro hac* papers. The
21 order has been signed. So, thank you.

22 The committee had a lot of concerns because there
23 were some numbers that exceeded the statutory cap. We met in
24 person, as Mr. Meisler pointed out, on Friday. Six of the
25 seven committee members were present in person. Some of

1 them, at least two of them I think, having to fly in from out
2 of town. We listened to the concerns expressed by the
3 debtors' principals and what not.

4 While the committee took those to heart, you know,
5 we -- just to give a little bit more of the give and take we
6 had one committee member who said, you know, our job was
7 helping you sell products. We had our own sales force. And
8 we had to skip some bonuses to our people because you didn't
9 pay us.

10 So, with that give and take we came up with a
11 resolution which the committee got behind, which is the folks
12 who aren't being continued. It's hard to justify right now
13 paying them prepetition wages under the rule and necessity.
14 It's not anything we're all happy about, but that was the
15 resolution that we reach.

16 So, we support it and we think it's fair. We want
17 the remaining sales force to be motivated in the right
18 direction.

19 THE COURT: Thank you.

20 MR. MEISLER: Terrific. Thank you, Your Honor.

21 I would note that with that change, Your Honor, we
22 believe that the 503(c) standard is now moot. The reason why
23 we say that, Your Honor, is that with respect to the Baxdela
24 sales force we were trying to do something that was outside
25 of our sales program as it's written in our manual. That is

1 that outside a change of control, in other words a sale
2 transaction, if you're not there on the payment date then you
3 don't get paid your commission.

4 So, that was something that we thought was
5 important. We still think it's important for maintain the
6 moral of the work force, but since we don't have to do
7 something outside of the ordinary course we no longer think
8 the 503(c) standard is relevant.

9 Your Honor, obviously, though, if you do have
10 questions and you think the standard applies we're ready to
11 argue it on whatever point you may want us to address. The
12 same thing for the U.S. Trustee.

13 So, Your Honor, that leaves us with the objection
14 by the U.S. Trustee. The trustee argues that the debtors may
15 not pay prepetition employee obligations in excess of the
16 priority cap set forth in 507(a)(4) and 507(a)(5) of the
17 Bankruptcy Code. Your Honor, that proposition is not the
18 law. Delaware, this district is a jurisdiction that
19 promotes, of course, value maximizing reorganizations. And
20 the largest and most complicated businesses that need to
21 reorganize choose Delaware, amongst other jurisdictions, as
22 their venue in an effort to avoid liquidation, and loss of
23 jobs and value. They do this because in this district the
24 courts here understand and agree with the doctrine of
25 necessity; meaning that payment of prepetition amounts that

1 are necessary to preserve the going concern value of the
2 debtors are permitted.

3 At the outset I would note that, in my view, even
4 the U.S. Trustee subscribes to the doctrine of necessity, as
5 evidenced by the lack of her objection, to the critical
6 vendor's motion and the customer programs motion.

7 Here, Your Honor, distinct from, say, for example,
8 the customer programs motion there is a statutory priority.
9 So, in other words, the code actually tells us that
10 notwithstanding even the doctrine of necessity, but the code
11 actually promotes reorganizing companies, promotes debtors to
12 pay employees.

13 Your Honor, Judge Sontchi explained in Gibson
14 Brands in July 2018 that in the face of similar objections
15 that a debtor cannot pay in excess of the priority cap.
16 Judge Sontchi explains, and I quote,

17 "The doctrine of necessity doesn't rely on the
18 provisions of 507 of the Code. Critical trade vendors are
19 paid. There's nothing in the code that you would give them,
20 those kinds of creditors, any kind of priority, yet those are
21 approved in certain cases based on a showing that there is a
22 risk of irreparable harm to the debtor's business. That
23 limit is set forth in the code, no priority exists, and yet
24 those are approved."

25 He goes onto say with respect to the wages motion

1 at issue in that case, he says,

2 "It's not just good for a debtor or a debtor's
3 business to put that kind of weight on employees, many of
4 whom live paycheck to paycheck. So, I understand, and
5 appreciate and endorse the statutory priority limitation and
6 it would certainly be the case in the vast majority of
7 instances that that would be the limit, but in this case I am
8 willing to make a rare exception."

9 Your Honor, in our case, since January 1st, 2020,
10 16 employees have resigned. There's significant anxiety
11 about this motion and our ability to honor our commitments to
12 the workforce. Again, that is why this employee wages motion
13 is so incredibly important to us; to maintain the value
14 maximizing marketing process that we have ongoing we need our
15 workforce to be with us shoulder to shoulder.

16 Your Honor, Judge Gross issued a memorandum of
17 opinion in LifeCare in 2013. He justified those payments in
18 excess of the priority cap by saying that,

19 "Eligible employees, their efforts are necessary
20 to preserve the debtor's business. As the debtors point out,
21 the courts permit payments to critical vendors when it
22 benefits the bankruptcy estate. The same principal is at
23 work here, namely preservation of the estate."

24 With that, Your Honor, Judge Gross approved
25 payments in excess of the priority cap. That is In Re LCI

1 Holding Company, Inc., Case Number 12-13319 found at 2013 WL
2 1101111. That was March 15th, 2013.

3 Your Honor, we note that in other cases before
4 you, Chaparral, FTD companies, you similarly approved
5 payments under a wage motion in excess of the cap.

6 Your Honor, we go through the case law in our
7 papers and we lay the groundwork for the necessity of payment
8 doctrine in our motion at Paragraphs 79 through 83 in our
9 reply, at Paragraphs 14 through 19. And as we note, this
10 doctrine has been around us for a long time; in fact, since
11 1882 when the Supreme Court issued an opinion that supported
12 the doctrine of necessity.

13 Courts unquestionably can and regularly do approve
14 payment sin excess of the priority amounts under this
15 necessity of payment doctrine when they are critical to
16 preserve and enhance value of the debtors' estate. Here,
17 Your Honor, the debtors have made that determination and
18 these payments are necessary.

19 It brings us to the real issue that we are here
20 for today, Your Honor; have the debtors submitted sufficient
21 evidence to support the payment of prepetition employee
22 obligations as set forth in our wages motion. Your Honor, we
23 submit that the answer to that question is yes and we believe
24 that evidence as set forth in the first day declaration of
25 Mr. Peter Milligan, the chief financial officer. That

1 evidence is substantial and uncontroverted. Your Honor, it
2 was moved into evidence at the first day hearing. We refer to
3 it again and we ask that Your Honor permit us to move that
4 evidence into hearing for this matter. That declaration,
5 Your Honor, was filed at Docket Number 17.

6 Your Honor, I'd pause just for a moment in case
7 there is questions.

8 THE COURT: Do you have a copy of the first day
9 declaration?

10 MR. MEISLER: We surely do.

11 THE COURT: I usually have one in my book, but I
12 don't seem to.

13 MR. MEISLER: We have eight copies. If I may
14 approach.

15 THE COURT: You may. Thank you.

16 Is there any objection to the submission of Mr.
17 Milligan's declaration into evidence at this hearing?

18 (No verbal response)

19 THE COURT: I hear none. It's admitted.

20 (Declaration of Peter Milligan, admitted)

21 MR. MEISLER: Thank you, Your Honor.

22 So, I'd like to take this in pieces first dealing
23 with, if you will, the reimbursable expenses, then with
24 commissions, then vacation policy, severance plans and the
25 401(k) plan.

1 Your Honor, with respect to reimbursable expenses
2 candidly, Your Honor, we strongly believe that if an
3 individual has made an expense, as covered, an expense of the
4 company that they should be reimbursed. Your Honor, the
5 amount of such expenses that we believe need to be reimbursed
6 is \$167,000 dollars and change, approximately \$316 dollars.
7 The number could tick-up if someone has not yet submitted
8 their expenses, but we believe the petition date, of course,
9 was December 27th. So, we believe that most, if not all,
10 have submitted their expenses.

11 We do have approximately 187 employees. So, when
12 you do the math, and considering that our sales force is on
13 the road all the time, so it's understandable that they would
14 incur those expenses and expect to be reimbursed.

15 Your Honor, 155,000 of the 167 mentioned was
16 honored pursuant to the interim order. So, Your Honor, what
17 we're really talking about here is approximately \$12,000
18 dollars in expenses that remain to be honored as well as any
19 that are submitted after the calculation was made.

20 Your Honor, I refer you to Paragraphs 114 and 115
21 of Mr. Milligan's declaration. He says, specifically,

22 "I believe that the debtor's ability to reimburse
23 the reimbursable expenses has a significant effect on the
24 debtors' employees who are critical to the debtors' business.
25 Specifically, the debtors' sales employees spend significant

1 time on the road incurring expenses in support of sales of
2 the medications which are the debtors' primary driver of
3 revenue. Thus, I believe that reimbursement of the
4 reimbursable expenses is critical to the morale of the
5 debtors' sales employees which in turn is paramount to
6 maximizing the value of the estates."

7 Your Honor, I could go on. There is more
8 testimony in Paragraph 115, but I feel relatively
9 comfortable, Your Honor, that unless you have questions I do
10 believe that we have carried our burden.

11 THE COURT: I don't have any questions on that.

12 MR. MEISLER: Thank you, Your Honor.

13 Your Honor, I move next to the commission plan.
14 Your Honor, there are approximately 106 non-Baxdela sales
15 employees, sales people. Mr. Milligan declared that making
16 these payments is critical to employee morale and retention.
17 As you know, we have now deferred the request to pay those
18 commissions to the Baxdela sales employees who were given
19 notice and who will be leaving mid-February. We'd like to
20 note that the remaining employees, the commissions are
21 approximately 1.1 million, could be 1.17, 1.13, but in that
22 vicinity.

23 Your Honor, in Paragraph 97 of Mr. Milligan's
24 declaration he states, in part,

25 "Payments under the sales commission plan are

1 critical to maintaining the morale and productivity of the
2 debtors' sales force, and to maximizing the value of the
3 debtors' estates. In particular, I believe that the debtors'
4 ability to maximize value and continue operations depends in
5 large part upon retention and motivation of the sales
6 employees."

7 Your Honor, I'd point you next to Paragraph 142
8 where Mr. Milligan says,

9 "The debtors seek to continue their ordinary
10 course employee compensation including sales commission plans
11 and related programs during the post-petition reorganization
12 process. I believe the continuation of these programs is
13 essential to the success of the debtor's reorganization."

14 Then, Your Honor, I move you to Paragraph 143 of
15 Mr. Milligan's declaration where he says,

16 "Failing to honor these obligations would severely
17 hamper the debtors' ability to operate their businesses
18 during the Chapter 11 cases and, thus, endanger the debtors'
19 reorganization. The debtors' employees possess knowledge
20 unique to the debtors' medications and operations. Replacing
21 the employees institutional knowledge would require the
22 debtors and the remaining employees to spend significant
23 time, capital and effort, all of which I believe would
24 distract the debtors from the task at hand in these Chapter
25 11 cases. Thus, the loss of valuable employees would

1 diminish the debtors' ability to execute their value
2 maximizing strategy that would harm the debtors'
3 stakeholders. I therefore believe that authorization to pay
4 the prepetition employee obligations is critical to maximize
5 value of the debtors' estate for all creditors and
6 stakeholders."

7 Your Honor, a particular -- the more a particular
8 employee exceeds the priority amount it means the individual
9 is a star. Your Honor, we want to motivate that star to keep
10 selling, to keep doing his job, to keep doing here job, Your
11 Honor. So, for that reason even if it exceeds the priority
12 amount, Your Honor, we believe it is necessary to preserve
13 the value of the estate to honor our commitment to that sales
14 person.

15 Your Honor, next I want to pause actually just to
16 address any questions you may have on the commission plan.

17 THE COURT: I was looking to see if Mr. Milligan
18 says what portion of an employee's comp for a sales personnel
19 is in commission, but I do see that he states that it's an
20 integral part of their aggregate compensation package which I
21 would assume that it is.

22 MR. MEISLER: Correct, Your Honor. The sales
23 personnel, they view their commissions as part of their
24 ordinary course wage.

25 THE COURT: Okay.

1 MR. MEISLER: This is typical in the pharma
2 industry. The sales personnel are so important to the
3 business. Your Honor, me up here today is, in part, I think
4 it's important to send a message to that work force that we
5 support them.

6 Your Honor, the third item that want to address I
7 vacation time. As we noted in our motion, in our reply with
8 respect to vacation time the debtors' policy is modest. The
9 debtor does not pay out for unused vacation time unless state
10 law requires the company to do so.

11 And, Your Honor, we have, I guess, some good news.
12 The numbers that we had in our motion were 2019 numbers. We
13 believed that we were going to have approximately \$578,000
14 dollars of potential accrued, but unused vacation time. Your
15 Honor, if somebody takes the vacation time, of course, we
16 wouldn't pay it out. Because we rolled into a new year
17 today, as I stand before you, our estimate is up to 217,000.
18 So, a significant decrease and that is across approximately,
19 again, 187 or so employees.

20 Your Honor, this comes right down to state law.
21 State law requires a limited number of days of vacation to
22 roll over if they're unused. That is the reason for the
23 policy.

24 Your Honor, at Paragraph 143 Mr. Milligan
25 testified to the failure of what would happen if we failed to

1 honor the payment of the debtors' paid time off obligations.

2 He says, specifically, that doing so would, and I quote,

3 "Severely hamper the debtors' ability to operate
4 the business during these Chapter 11 cases and, thus,
5 endanger the debtors' reorganization."

6 Your Honor, as mentioned, our next topic that we'd
7 like to cover is the severance plan. Your Honor, I'm hopeful
8 that this one is easy because, Your Honor, we are not seeking
9 to authorize payment of severance amounts, number one, to
10 insiders at all, if we do so we will do so by separate
11 motion, and, two, to the extent any employee would receive
12 compensation that satisfies the cap or exceeds the cap then
13 the severance dollars would not be paid out.

14 In other words, if we're using unused vacation, or
15 commission, or 401(k), which I will speak to next, and we
16 fill the cap in that way then we will not pay out any
17 severance dollars. If, however, we have dollars remaining in
18 the priority cap then we would use those dollars to honor
19 severance.

20 THE COURT: Okay.

21 MR. MEISLER: So, Your Honor, we believe that the
22 severance plan, as its being sought in the motion, shouldn't
23 be controversial including to the U.S. Trustee, but, of
24 course, she will speak for herself.

25 Last, but of course not least, we have a 401(k)

1 matching plan. We had in our motion that we believed that
2 the estimated amount would be \$135,000 dollars. Now that
3 we're in the New Year we are able to reconcile those numbers.
4 We believe, actually, it will be about \$193,000 dollars.
5 Your Honor, those payments would count towards the cap.
6 Putting aside the commission plan, even if you add up the
7 unused vacation time and the maximum amount gets used and you
8 add up the 401(k) nobody exceeds the cap. What will bust the
9 cap though, to be sure, is the commission plan.

10 We are not asking -- unlike the severance plan
11 we're not taking the same position with the 401(k) match nor
12 with the unused vacation. We are asking to honor those in
13 full notwithstanding that they were earned other than three
14 days in the prepetition period.

15 So, again, Your Honor, I want to highlight that
16 the number that we believe is outstanding with respect to our
17 current workforce is approximately \$193,000 dollars. Your
18 Honor, we would ask that you grant us that relief.

19 Your Honor, with that I think I've given a
20 comprehensive overview of what we are seeking in our
21 arguments. I pause in the event that you have any further
22 questions and, otherwise, cede the podium to the U.S.
23 Trustee.

24 THE COURT: I just want to make sure I understand
25 which count towards the cap and which don't. So, commission

1 doesn't.

2 MR. MEISLER: Commission would exceed the cap.

3 THE COURT: Right.

4 MR. MEISLER: It does, Your Honor, count towards
5 the cap for purposes of severance.

6 THE COURT: That is what I want to make sure I
7 understand, that piece of it.

8 MR. MEISLER: Yes.

9 THE COURT: So, say it again what counts towards
10 the cap or how the cap works.

11 MR. MEISLER: Everything that an employee earns
12 would count towards a cap. So, commissions, any payout of
13 unused vacation time, the 401(k) match. I think that that is
14 really it as far as what an employee is owed that would show
15 up on an employee's W-2.

16 The company is contribution to say, for example, a
17 healthcare premium for the company that allows the company to
18 have healthcare insurance that would not count towards a cap
19 because it's not income for an individual employee. It an
20 obligation that the company owes to make sure it honors its
21 healthcare obligations.

22 THE COURT: Okay. The severance plan, what you're
23 saying is that with respect to severance if other payments --

24 MR. MEISLER: Correct.

25 THE COURT: -- hit the cap then you are not going

1 to pay severance over and above that amount. Is that right?

2 MR. MEISLER: That's exactly right. So, if we hit
3 \$13,650 dollars on account of other items that would show-up
4 on an employee's W-2, commission plans, unused vacation,
5 401(k) match, if I'm not naming something, if it ends up on
6 their W-2 we have people at the company that are tracking
7 this and we have Portage Point, they're tracking it.

8 So, we commit to you, Your Honor, that nobody --
9 that until we come back before Your Honor to ask for
10 permission to honor severance in its entirety no employee is
11 going to get severance if that incremental dollar exceeds the
12 cap.

13 THE COURT: Okay.

14 MR. MEISLER: Your Honor, I do want to note,
15 though, that we do plan on coming back before Your Honor on
16 the balance of the severance. We purposely didn't push it
17 forward today. Number one, I know it's a hard decision. I
18 know it's a hard issue. Number two, it really also depends
19 upon what happens at auction. It's very possible that a
20 bidder will take the majority of the workforce or maybe all
21 the workforce, who knows, and we think it's premature to
22 address it now as opposed to understanding where we are post-
23 auction.

24 THE COURT: Thank you.

25 MR. MEISLER: Thank you, Your Honor.

1 THE COURT: Ms. Richenderfer.

2 MS. RICHENDERFER: I didn't know if there was
3 anyone else who wanted to speak in favor.

4 THE COURT: Okay. Would anyone else like to speak
5 in favor?

6 (No verbal response)

7 THE COURT: You're up.

8 MS. RICHENDERFER: Good afternoon, Your Honor;
9 Linda Richenderfer from the Office of the United States
10 Trustee.

11 There are so many different ways of approaching
12 this. First of all, I guess I am here to support in the
13 objection that was filed by the United States Trustee which
14 was called by the debtors as a programmatic objection in
15 Paragraph 3 of their filing. I would, instead, submit to the
16 court that the objection is based on the bankruptcy code, and
17 I will walk the court through it.

18 I think also debtors' counsel misspoke when he
19 said 16 employees have resigned since the filing. At least
20 the information that I and the committee have was six
21 employees had resigned since the filing of the bankruptcy
22 petition. So, if there is an additional 10 we have not been
23 updated as to that information.

24 Your Honor, let me start, I guess, where you
25 ended; that's not what the proposed final order says. That

1 is one of the problems with the proposed final order. The
2 proposed final order, looking at Docket Number 191-1,
3 Paragraph 2 is a standalone paragraph that says that debtors
4 may pay any amount due and owing to non-insider employees
5 pursuant to the severance policy up to the 13,650 priority
6 cap. There is nothing in here that says, oh, but if they've
7 already gotten commissions, or if they have already gotten
8 vacation time, or if they've already gotten 401(k) payments
9 they don't get the 13,650. That is the first issue.

10 The second issue is it's almost the end of
11 January. Federal law requires that W-2 statements be sent to
12 all employees by the end of January. Yet, debtors have not
13 been able to provide to me an employee by employee
14 reconciliation of how much is due and owing on commissions.
15 So, while we have a total amount which hasn't exactly been
16 nailed down yet, I heard different numbers being put on the
17 table there by Mr. Meisler, I don't know whether this total
18 amount means one employee is going to get \$5,000 dollars and
19 another one is going to get \$50,000 dollars taking them
20 significantly over the cap, or whether they're all going to
21 be averaging around the same and will be near the cap.

22 There have been other occasions when I know
23 debtors have come to this court and without objection by the
24 United States Trustee allowance has been made for payments
25 over the cap. That was when we walked into court knowing the

1 total amount the debtor wanted to pay. And we knew what is
2 was going to be per employee so we could look and see the
3 range.

4 I received an updated sheet for the current
5 employees, I think, as of last evening. They still do not
6 know what the commissions will be per person. So, I don't
7 know what this court is being asked to approve. I don't know
8 how much over the priority cap anyone individual may be
9 receiving for there to be any evaluation. I am sure there
10 were many occasions, as cited by debtors' counsel, when other
11 courts and even this court approved payments over the cap,
12 but I don't know that if in those opinions it tells you how
13 much over the cap.

14 I do know in other instances where I have been
15 involved and payments were made over the cap they were very
16 specifically delineated in the form of order. There was a
17 total number and even if it wasn't in the order going into
18 the order we knew what the range was going to be per
19 employee, at least a top and a bottom number. I don't have
20 that information. I don't know the W-2's are going to go out
21 by the end of the month. The debtors don't have it as of
22 today, but that information has not been provided.

23 I also think there should be a cap in here for the
24 401(k). I mean there should be a number. The concern, I
25 guess, overall, Your Honor, what I am getting to is it's

1 almost like we're giving a blank check to the debtor because
2 there is no caps that have been put in here for what each of
3 these items will be.

4 Again, if the severance in Paragraph 2 is subject
5 to what they get in the other paragraphs of the order that's
6 a totally different situation then the way the order reads
7 right now. It's a different situation then what was
8 discussed during my discussions with the debtor.

9 I guess the same thing is vacation doesn't come
10 into play, it's my understanding, unless and until an
11 employee is terminated. Then I am well aware that many
12 states require it to be paid out, but we're looking at right
13 now, today, what people are going to be paid. And if, I
14 guess, somebody is terminated and they're owed vacation that
15 could be taken into account. And if they have already
16 received 13,650 because of their commissions then I think
17 there should be another discussion. It shouldn't be
18 automatic that you get to have two different buckets. You
19 get to have a bucket for commissions and a bucket for
20 severance.

21 THE COURT: I have to say commission -- I'm
22 sympathetic to commission for sales people, okay. I'm
23 sympathetic because it's usually significant and the
24 representation is here that it is a significant part of their
25 overall compensation package. And so to the extent that it's

1 been earned and it's owed subjecting that to a cap almost
2 seems to penalize your best performers.

3 MS. RICHENDERFER: Your Honor, I'm not saying a
4 cap per person. I'm saying that at this point in time I would
5 have thought there would have been a reconciliation done so
6 that we knew in total for accounting purposes how much the
7 debtor was going to pay out on this prepetition commission
8 item and arrange what was going to go to the individual
9 employees. There has to be, I guess, for budgetary purposes
10 that information should be available at this point in time.
11 And the fact that we don't have it that was part of the
12 reason for the objection on that.

13 THE COURT: And I understand the informational
14 deficit.

15 MS. RICHENDERFER: And if really what was meant
16 was that Paragraph 2 was supposed to be subject to other
17 payments that may have already been received by the employees
18 then that is something that can be worked on and that can be
19 revised.

20 As to expenses, Your Honor, I don't disagree that
21 they should be reimbursed. And in the interim order we had a
22 cap that was put in there that's very close to what it sounds
23 like is due and owing. So, I don't know why we don't just
24 carry that over and increase it to an amount that the debtors
25 now believe is due and owing because one of my concerns is

1 that in the interim order it allowed the debtors to reimburse
2 employees for up to \$155,000 dollars. The new order does not
3 have any. It just reimburse employees and members of the
4 board of directors. So, we're adding in members of the board
5 of directors in the final order. I don't know what they are
6 owed.

7 I do know, and I have been given some numbers by
8 the debtor, as to what is owed to employees. And a good
9 amount of what is owed to employees is on the corporate
10 American Express card. It's not money that people have gone
11 out of pocket. I'm not saying the company shouldn't pay.
12 I'm just saying that Paragraph 6 of the interim order had a
13 cap and Paragraph 5 of the final order should have a cap in
14 it.

15 Again, by now they should know. I would be very
16 concerned if there is an employee who at this point in time
17 after the bankruptcy filing hasn't submitted their expenses
18 but, again, \$25,000 dollar wiggle room can be possible, but,
19 again, there should be a cap especially once we start to
20 include the insiders in that category.

21 I am glad to see that the committee was able to
22 work with the debtors and as of last Friday got them to
23 delete out the Baxdela sales employees because for reasons
24 that we can go into in another point in time if and when that
25 becomes an issue before the court.

1 One of the things that was not addressed by
2 debtors' counsel is the proposed -- it's Paragraph 7 in the
3 final order, again, at Docket Number 191-1. Your Honor, they
4 want the debtors to be authorized in their sole discretion to
5 pay the employee withholdings which include various taxes
6 that are taken out of all our salaries.

7 Your Honor, I had asked that in their sole
8 discretion be stricken. It's my understanding from debtors
9 that there are prepetition payroll taxes that have been
10 withheld that have not yet been paid to the appropriate
11 taxing authority. I had also asked that they put in here
12 requirement that they be paid in a certain number of days.
13 Again, I don't know how the W-2's are going to be correct. I
14 don't know how these people are going to be able to file
15 their tax returns, if they're going to report taxes that were
16 taken out of their pay that have not yet been forwarded to
17 the appropriate taxing authority. There is going to be some
18 confusion if they are reviewed or audited at the other end of
19 the line.

20 I don't know why it hasn't been resolved yet.
21 This has been an issue that my office was aware of since the
22 IDI, the day of the formation meeting. I am told that the
23 money is available, but I don't know why it hasn't been paid
24 out yet. And so those were -- I'm hitting the highlights
25 here, Your Honor, but the long and short of it is we need

1 some parameters around this. Paragraph 2 needs to be
2 clearer. Payroll taxes need to get paid. And need to be
3 very clear about what is going to count against the capital
4 and what's not. Commissions, I agree, they can be a large
5 part, but, again, the numbers should be known. We should
6 know what we are allowing the debtors to pay out.

7 THE COURT: Thank you.

8 Mr. Meisler?

9 MR. MEISLER: Okay. Thank you, Your Honor.

10 I heard six issues from the U.S. Trustee and I'd
11 like to take them one at a time.

12 Your Honor, as to the discrepancy in numbers, Your
13 Honor, I think the U.S. Trustee mentioned six employees. I
14 mentioned to you 16. I assure you 16 is the right number. I
15 believe that the U.S. Trustee is mistaken when she says six.
16 I believe the information given to her was 6 percent, not six
17 individuals.

18 THE COURT: Okay.

19 MR. MEISLER: Now that number of 6 percent is no
20 longer accurate because at the time that people from my
21 office communicated the 6 percent we have since had
22 additional attrition.

23 Your Honor, as to the explanation that we had on
24 the record regarding the severance calculations of the
25 \$16,650 cap I thought Paragraph 2 was sufficient. It was

1 intended to capture that. I have no issue whatsoever to
2 modify that language because clarity is always what we strive
3 for. So, happy to work with the U.S. Trustee and submit an
4 agreed upon order, hopefully, that resolves that issue.

5 Your Honor, with respect to W-2's to be sure, I'm
6 not a tax lawyer, but what I believe is the rule is that
7 individual tax payers they account for their income on a tax
8 cash basis. So, because the commissions are paid in 2020 for
9 the Q-4 commissions my understanding is that it's a W-2 for
10 2020 and not 2019.

11 Now I also want to make a mention that the reason
12 why we know -- we know the sales in totality for the fourth
13 quarter is it would not exceed \$1.5 million dollars of which
14 approximately \$330 to \$400,000 dollars is attributable to
15 Baxdela. Now in order for us to figure out how much we owe
16 to each individual we have to trace every prescription and
17 every --

18 THE COURT: I think the U.S. Trustee is at a cap
19 at this point. So, I think that a cap can be inserted into
20 the order, an aggregate cap.

21 MR. MEISLER: An aggregate cap. Your Honor, that
22 would be fine. I think for comfort we would probably want
23 \$1.2 million dollars.

24 THE COURT: I think that's fine. I think a
25 cushion is fine.

1 MR. MEISLER: Your Honor, I'm just going to turn
2 to -- I'm getting the nod of approval. So, we're good there.

3 THE COURT: Okay.

4 MR. MEISLER: Your Honor, with respect to the 401
5 (k) we did give the U.S. Trustees Office information on an
6 individual by individual basis as to what the match is. So,
7 candidly, I am not sure what the challenge is other than the
8 issue of generally don't exceed the 507(a)(3) and (a)(4) cap.

9 THE COURT: I think she was at a cap on that as
10 well, an aggregate cap. As I understood the objection as it
11 has been refined I think sit was an informational issue and a
12 cap issue.

13 MR. MEISLER: Understood. Your Honor, having a
14 cap of -- I know its 192,000 and there's a few more digits
15 after that \$193,000 dollars.

16 THE COURT: I would add cushion.

17 MR. MEISLER: Oh, sorry. I'm reminded that there
18 is a \$10,000 dollar potential audit related to --

19 THE COURT: I think you should speak to the U.S.
20 Trustee. I think she will be reasonable to agree to a
21 cushion that you need.

22 MR. MEISLER: Terrific. So, I think that number,
23 for the record, is going to be \$204,000 dollars to include
24 the \$10,000 dollars from 2018.

25 Regarding the reimbursable expenses the U.S.

1 Trustee mentioned the Amex card that people have, a corporate
2 card. While it's got the individuals name on it --

3 THE COURT: I'm sure it does.

4 MR. MEISLER: Right. And so if the company
5 doesn't honor that expense, well, American Express is going
6 to be looking for that individual and we believe that's not
7 good for morale or maintaining our work force.

8 As for the board of directors it's true we do have
9 a submission of approximately \$375 dollars.

10 THE COURT: It's an expense reimbursement?

11 MR. MEISLER: That it, yes.

12 THE COURT: That's fine.

13 MR. MEISLER: Terrific. Thank you, Your Honor.

14 Then with regard to the payroll taxes we have no
15 issue with removing sole discretion. Of course, we submit
16 the payroll taxes. The issue with the payroll taxes it's
17 approximately \$200,000 dollars that the company is just
18 reconciling to make sure that they don't overpay on payroll
19 taxes. We don't want to put a fuse on it because we don't
20 want to pay more then what we owe.

21 We absolutely will pay the payroll taxes. We have
22 tens of millions of dollars of cushion to make sure that we -
23 - that is our cash on hand to make sure that we honor those
24 payroll taxes. So, we don't see any risk there and we would
25 be pleased to report to the U.S. Trustee, if necessary, on a

1 monthly basis to make sure she is aware of what is going on
2 in the payroll taxes. I would bet it wouldn't take too many
3 reports before it's resolved.

4 THE COURT: Okay.

5 MR. MEISLER: Thank you, Your Honor.

6 THE COURT: Thank you. Okay. Well, I am going to
7 approve the request, but go ahead, Ms. Richenderfer.

8 MS. RICHENDERFER: Your Honor, it wasn't clear to
9 me whether or not debtors were agreeing that they would put
10 in a cap for the expenses. I just wanted to clarify that.

11 THE COURT: Thank you.

12 There is one in the proposed form of order that I
13 am looking at. No, that's the interim.

14 MS. RICHENDERFER: There's one in the interim, but
15 not in the final.

16 THE COURT: They will put one in the final.

17 MS. RICHENDERFER: Okay.

18 THE COURT: Thank you.

19 MR. MEISLER: Your Honor, I was not inclined to do
20 a cap on the expense reimbursement. Obviously, we will if
21 you impose it on us. We just don't want to come back so that
22 we're honoring someone's expenses that they incur for
23 purposes of pushing forward --

24 THE COURT: I'm going to have you put in a cap and
25 if you need to exceed the cap you can inform the committee

1 and the U.S. Trustee. If you don't get agreement you can
2 come to me.

3 MR. MEISLER: Terrific. Thank you, Your Honor.

4 THE COURT: Okay. I'm going to approve the
5 request on a final basis to pay the wages and continue the
6 additional compensation programs as requested in the first
7 day wages motion with the express proviso that there be caps
8 placed in the order as discussed on the record at the request
9 of the Office of the United States Trustee.

10 I think it is acceptable in certain cases such as
11 this one to exceed the cap where the testimony from the first
12 day declaration supports the need to do so in order to ensure
13 that the employees do not take the brunt of the filing of the
14 bankruptcy proceeding. And when I look at the categories of
15 compensation claims or wage related claims that we are
16 speaking about they don't concern me. They are the
17 reimbursable expenses of employees who charge something on a
18 credit card, spent money on the debtors' behalf.

19 The commissions I have talked about. They are
20 central to sales people's employees, sales people's wages. I
21 think its acceptable when commission based salaries are a
22 reason that someone is going over the cap.

23 With respect to vacation time my understanding
24 here is that it's not paid out unless it's required under
25 state law. To me that is an acceptable reason to be paying

1 it so that the debtor is in compliance with state law.

2 The severance plan we've spoken about. Please
3 coordinate with the Office of the United States Trustee to
4 ensure that that paragraph reflects the representations that
5 have been made to me, that there will not be pay-out on the
6 severance plan to the extent it causes an individual employee
7 to go over the cap given payments otherwise.

8 The 401(k) matching requirement the only objection
9 I heard with respect to that was, again, with respect to a
10 cap. I think it's highly appropriate to make payments on
11 that type of compensation for people who are saving for
12 retirement.

13 So, under these circumstances the necessity of
14 payment doctrine permits me to approve this request and I
15 will do so. I do appreciate the fact that the Office of the
16 United States Trustee raises questions. I think it's
17 appropriate to have caps and to know exactly what is being
18 paid out.

19 I will look for a revised form of order.

20 MR. MEISLER: Thank you, Your Honor.

21 MR. GALARDI: Your Honor, Gregg Galardi on behalf
22 of Vatera.

23 Your Honor, the next matter on the agenda I just
24 wanted to point out because I am concerned about the agenda.
25 If Your Honor is familiar with 9029-3 of the hearing agenda

1 and you know the history of this probably as well as I do --

2 THE COURT: I think I made the history on this.

3 MR. GALARDI: I think you did, Your Honor. And I
4 remember changing the history and having the rules. And I
5 wouldn't rise because I don't really care about the agenda
6 numbers, but, Your Honor, and I would never say this about my
7 former firm, it's interesting that Number 18 on this agenda
8 is the injunction.

9 THE COURT: I noticed that.

10 MR. GALARDI: Frankly, it is Number 15 on the
11 docket. It is the next lowest number and I would ask Your
12 Honor to go forward on that because, otherwise, we may be
13 enjoined because of a lack of time.

14 THE COURT: Well, I had thought about that and I
15 had given my own thought to the order that we need to go
16 forward in. And if, in fact, Vatera was looking to trade now
17 I'd move it up.

18 MR. GALARDI: Your Honor, there's no evidence that
19 we're not.

20 THE COURT: Well, is there evidence that you are?
21 Let me just ask flat out because I want to know --

22 MR. GALARDI: We want the option to do so, Your
23 Honor, yes.

24 THE COURT: Okay. I'm going to put you ahead of
25 every retention motion. So, we don't have to worry about

1 those, but I am going to take bid procedures and I'm going to
2 take the DIP --

3 UNIDENTIFIED SPEAKER: Cash collateral.

4 THE COURT: I'm sorry, cash collateral and the
5 KEIP. Then I am going to get to your matter. And if we can't
6 make it I'll have you back here later this week or early next
7 week.

8 MR. GALARDI: Thank you, Your Honor.

9 MR. MEISLER: Thank you, Your Honor.

10 Your Honor, for the next matter I'm going to cede
11 the podium to my colleague Mr. Dressel.

12 THE COURT: Mr. Dressel?

13 MR. DRESSEL: Thank you, Your Honor. For the
14 record Christopher Dressel of Skadden Arps on behalf of the
15 debtors.

16 Your Honor, this item is the debtor's motion to
17 establish bidding procedures related to the debtors' post-
18 petition sales and marketing process which we filed at Docket
19 Number 67. There were several objections filed to this
20 motion. Vatera filed an objection at Docket 127. The
21 committee filed an objection at Docket 136. The U.S. Trustee
22 filed its objection at Docket 147. And we filed our reply at
23 Docket Number 163. Deerfield filed a reply in support as
24 well at Docket Number 167.

25 Your Honor, in connection with the reply we filed

1 two supporting declarations. We filed the declaration of
2 Jeffrey Finger who is a managing director at Jefferies, LLC,
3 which is the debtors proposed investment banker. That was
4 filed at Docket Number 164. And in addition to that we filed
5 a declaration of Peter Milligan, the debtors' chief financial
6 officer. That was filed at Docket Number 165.

7 Your Honor, I would like to move the admission of
8 those declarations into evidence and in connection with that
9 I also have, on behalf of Mr. Milligan, a very short
10 clarifying proffer that relates to his declaration.

11 THE COURT: Does anyone object to the declaration
12 of Mr. Finger being admitted into evidence?

13 MR. MARTIN: Your Honor, subject to the
14 committee's right to conduct cross, which we would like to do
15 as part of this hearing, we have no objection.

16 THE COURT: Okay.

17 UNIDENTIFIED SPEAKER: Same thing, Your Honor.

18 THE COURT: Okay.

19 MS. RICHENDERFER: Same thing, Your Honor.

20 THE COURT: Okay. It's admitted subject to cross.

21 (Declaration of Jeffrey Finger, admitted)

22 THE COURT: What about Mr. Milligan's declaration,
23 the same?

24 MR. MARTIN: Same, Your Honor.

25 MS. RICHENDERFER: Your Honor, I'm just concerned

1 about admitting it if there are clarifying things that need
2 to be done in a proffer. I don't know what those are.

3 THE COURT: Okay. Well, let's hear the clarifying
4 proffer first and then I will ask again.

5 MR. DRESSEL: Your Honor, Mr. Milligan would
6 testify that the figure of negative \$1.3 million dollars
7 which is set forth in Paragraph 7 of his declaration is meant
8 to include average weekly accrued professional fee holdback
9 amounts.

10 That would be the conclusion of the proffer.

11 THE COURT: It's not operational.

12 MS. RICHENDERFER: No objection, Your Honor.

13 THE COURT: Okay. It's admitted.

14 MR. DRESSEL: Your Honor, pursuant to the sale
15 motion the debtors are seeking approval of bidding procedures
16 to govern a post-petition marketing and auction process. The
17 bidding procedures propose a calendar of dates. Some of the
18 highlights include a proposed bid deadline of February 10th,
19 an auction on February 13th and a requested sale hearing on
20 February 20th.

21 Your Honor, we have made relatively limited
22 changes to the proposed form of order and proposed bidding
23 procedures to accommodate certain issues raised by the U.S.
24 Trustee. As evidenced by the objection filed by the U.S.
25 Trustee we were not able to resolve all of the Offices

1 concerns, but we were able to resolve many.

2 If I may, Your Honor, I would like to approach
3 with blacklines of those documents.

4 THE COURT: Okay. Thank you.

5 MR. DRESSEL: Your Honor, my colleague, Mr.
6 Fitzgerald, has copies of the same documents that I just
7 submitted and available for others in the courtroom.

8 THE COURT: Okay.

9 MR. DRESSEL: Your Honor, as an initial matter I
10 want to take a minute to discuss the purposes and objectives
11 of the debtors sale process.

12 THE COURT: Well, wait a second. I don't want
13 argument right now. I would like evidence. So, if we're
14 going to -- before getting into argument let's hear the
15 evidence. If you have other evidence besides the two
16 declarations then I will take that.

17 MR. DRESSEL: The two declarations are the
18 debtors' evidence for this matter.

19 THE COURT: Okay. Let's complete the evidentiary
20 record then.

21 MR. MARTIN: Thank you, Your Honor. We'd like to
22 have Mr. Jeffrey Finger on the stand.

23 THE COURT: Mr. Finger?

24 JEFFREY FINGER, DEBTOR WITNESS, SWORN

25 THE CLERK: Please state your name and spell your

1 last name for the record.

2 THE WITNESS: Jeffrey Finger. Last name is F-I-N-
3 G-E-R.

4 CROSS EXAMINATION

5 BY MR. MARTIN:

6 Q Good afternoon, Mr. Finger.

7 A Good afternoon.

8 MR. MARTIN: Your Honor, just by way of background
9 the debtor -- since these declarations were filed on Friday
10 they did make both Mr. Finger and Mr. Milligan available for
11 deposition this morning and we conducted depositions to
12 streamline this process so that we could do some true cross
13 and not use up extensive amounts of the court's time.

14 THE COURT: I appreciate that.

15 MR. MARTIN: Thank you to the debtors for making
16 them available.

17 BY MR. MARTIN:

18 Q Mr. Finger, have you ever been to a bankruptcy court
19 auction?

20 A I have.

21 Q Okay. Have you ever handled one as lead?

22 A No.

23 Q And so this is your first transaction as lead?

24 A To the extent we go to auction, yes.

25 Q It's true, is it not, that from at least December

1 forward you have been instructed by your client not to
2 consider potentially interested parties who propose anything
3 other than paying Deerfield in full in cash?

4 A Can you restate the question, please?

5 Q From and after December 1st or December, let's say
6 December. From and after December you have been instructed
7 by your client not to consider potentially interested parties
8 who propose anything other than paying Deerfield in full in
9 cash?

10 A That is not true.

11 Q Okay. What is true?

12 A We entertained all interested parties bids including
13 certain that may not have provided 100 percent cash recovery
14 for Deerfield.

15 Q What period of time is that?

16 A Throughout the prepetition process. When we decided to
17 file with a restructuring support agreement with Deerfield I
18 suppose then we probably did not continue to offer those
19 other options as an alternative.

20 Q The option of doing anything other than paying
21 Deerfield in full in cash?

22 A Based on our discussions with Deerfield.

23 Q On January 21st, a week ago, the committee's
24 professionals provided you with the names of two additional
25 potentially interested parties and you have not reached out

1 to them yet, is that correct?

2 A That is correct.

3 Q One or more interested parties have asked you to
4 provide customer names to them, is that correct?

5 A That is correct.

6 Q And as an investment banker you recognize, do you not,
7 that customer names are important for formulating a bid?

8 A I do.

9 Q And you have not provided those customer names to
10 potentially interested parties because you are in the process
11 as of today, January 28th, of setting up a clean room?

12 A That is correct.

13 Q When do you expect that potentially interested parties
14 might be able to get that information?

15 A Shortly in the coming days.

16 Q And at least one bidder, Mr. Finger, has asked you for
17 a cure schedule for executory contracts. Is that correct?

18 A Yes.

19 Q And you have not provided any cure schedule to
20 interested parties?

21 A That is correct.

22 Q Now when I asked you at the deposition today when you
23 would provide interested parties with a cure schedule you
24 could only answer soon, is that correct?

25 A I believe I might have said imminently, but we will be

1 providing that shortly.

2 Q Mr. Finger, additional interested parties have come
3 forward following the petition date, have they not?

4 A Yes.

5 Q Mr. Finger, sitting here today isn't it true that you
6 do not have a high-level of confidence that absent more work
7 you will receive a qualified bid in this case besides
8 Deerfield?

9 A Can you restate the question?

10 Q Sitting here today you do not have a "high level of
11 confidence" that you will receive an additional qualified
12 bid?

13 A I am hopeful that we will.

14 Q There is some wood to chop, is there not?

15 A I don't follow.

16 MR. MARTIN: Nothing further.

17 THE COURT: Mr. Galardi?

18 CROSS EXAMINATION

19 BY MR. GALARDI:

20 Q Mr. Finger, do you have your declaration in front of
21 you?

22 A I do.

23 Q Okay. Could you please turn to Paragraph 8 of your
24 declaration? It refers to your being retained in August
25 2019, correct?

1 A Yes.

2 Q When did you actually start the marketing process?

3 A I believe our first phone calls were in the middle of
4 September.

5 Q Okay. In Paragraph 8, three lines down, it says you
6 were retained to look at potential financing transactions,
7 correct?

8 A That's correct.

9 Q And in looking for potential financing transactions did
10 you look at the Deerfield secured debt? Did you look at the
11 secured debt documents?

12 A I'm generally familiar with the Deerfield debt.

13 Q Did you determine whether those secured debt documents
14 allowed for an ABL to be *pari passu* with Deerfield?

15 A I recall there is a carve-out for a permitted ABL.

16 Q Okay. Did you look for any potential financing that
17 would be *pari passu*?

18 A We did offer that when we contacted financing sources.

19 Q And did you continue to do so through the sale process?

20 A Once all financing sources had declined interest or
21 failed to respond that is when that stopped.

22 Q Okay. So, there was no one who was looking to provide
23 an ABL, is that your testimony?

24 A I don't recall. What I would say is absent Deerfield's
25 consent.

1 Q So, Deerfield would have had to consent, correct?

2 A I believe that is the case.

3 Q But that's not true under their documents, isn't that
4 correct?

5 A I don't recall.

6 Q Okay. So, you don't know as you sit here today whether
7 you required Deerfield's consent to do that ABL loan *pari*
8 *passu*?

9 A I don't recall.

10 Q Okay. But you recall, somehow, talking to the
11 potential financing partners regarding that, but you don't
12 recall telling them we don't need Deerfield's consent?

13 A We solicited interest for financing from, I believe it
14 was, 47 different parties in a range of forms.

15 Q Okay. But you don't recall telling them that you could
16 do a \$20 million dollar ABL without Deerfield's consent?

17 A I believe that it was mentioned as one of two or three
18 different alternatives.

19 Q Now if you would turn to Paragraph 12 you have already
20 mentioned that you have solicited 47 potential capital
21 providers, correct?

22 A That's correct.

23 Q Did you provide those capital providers with what's
24 called a teaser?

25 A Yes.

1 Q Okay. What is your understanding of a teaser, just so
2 we get it on the record?

3 A General description of the company and the opportunity?

4 Q Okay. And did you provide those with a teaser with
5 respect to a potential *pari passu* \$20 million dollar loan
6 that might keep the company out of bankruptcy?

7 A I don't believe a text was specifically written as
8 such.

9 Q Okay. Now did you solicit anyone to do an alternative
10 plan of reorganization that might pay Deerfield over time in
11 full, but over time?

12 A We offered potential interested parties to pursue an
13 acquisition of the assets or, I believe, through a plan
14 structure.

15 Q Okay. But did you ever suggest to any of the potential
16 bidders that they may be able to do a plan that pays
17 Deerfield over time with deferred cash payments?

18 A I don't believe absent Deerfield's consent I'm able to
19 do that.

20 Q Okay. So you never offered that?

21 A I don't believe so.

22 Q Now if you would turn to Paragraph 21 of your
23 declaration, please. You have agreed with Deerfield to a \$2
24 million dollar expense reimbursement, correct?

25 A That's correct.

1 Q And what is the basis on which the company has agreed
2 to the \$2 million dollar expense reimbursement?

3 A It appears to be reasonable.

4 Q Do you believe it is required by their debt documents?

5 A I don't recall. I'd have to check.

6 Q But your separately seeking it even though it might be
7 required by their debt documents, right?

8 A Correct.

9 Q Have they agreed to cap that?

10 A I believe it's capped at 2 million.

11 Q Is that -- do they have to prove-up the expenses for
12 that?

13 A I don't know the answer.

14 Q Okay. Do they get that in addition to the 140 million
15 secured claim that you are giving them to bid?

16 A They get reimbursed on account of that.

17 Q So, they do? So, does it become a secured claim?

18 A I believe it comes out of the cash waterfall.

19 Q Does it come out as an administrative claim or as a
20 secured claim?

21 A I believe it's administrative.

22 Q Okay. So after they paid that then it would come out
23 of any recovery that the unsecured creditors or
24 administrative creditors, right?

25 A I believe so.

1 Q So, you don't think its part of the secured claim?

2 A I'm not that intimately familiar with how that relates
3 to the secured claim.

4 Q But you're here to testify that the 2 million is
5 reasonable?

6 A I am.

7 Q And on what basis are you testifying it's reasonable?

8 A Based on my experience with other M&A cases.

9 Q And how many M&A cases are styled as a credit bid to
10 get an expense reimbursement?

11 A I don't know the answer.

12 Q Okay. So, what is your experience with respect to --

13 A I've seen it in other --

14 Q Let me finish my question, sir, and then you can
15 answer.

16 So, in what credit bid scenario do you know a secured
17 lender gets a 2 million or an expense reimbursement?

18 A I can't think of a specific example sitting here today.

19 Q And let me ask you, do you think if you don't have them
20 as the stalking horse they're just going to walk away from
21 these assets?

22 A I can't speak for what Deerfield would do absent being
23 the stalking horse bidder.

24 Q And did they say absolutely positively under all
25 circumstances if I don't get this 2 million I'm going to walk

1 away from this bid?

2 A I don't know the answer.

3 MR. GALARDI: No further questions, Your Honor.

4 THE COURT: Thank you.

5 Ms. Richenderfer?

6 MS. RICHENDERFER: No questions, Your Honor.

7 THE COURT: Redirect?

8 MR. HOGAN: Thank you, Your Honor. For the record
9 Al Hogan for the debtors.

10 REDIRECT EXAMINATION

11 BY MR. HOGAN:

12 Q Mr. Finger, I just have a few follow-up questions for
13 you taking them in order with respect to the way you were
14 asked.

15 Counsel for the creditor committee asked you about two
16 interested parties that the UCC had proposed. You said you
17 hadn't reached out to those folks yet. What is your
18 intention with respect to those two folks?

19 A I have already spoken to my colleagues in the
20 healthcare practice that are coverage bankers for those two
21 companies. I understand one of them is in the market as part
22 of the sale process for that specific company. And the other
23 we contacted the sponsor as in private equity owner of said
24 company and the sponsor declined. That said, I intend to
25 still follow-up with both.

1 Q Okay. Very good.

2 Second, do you recall that there were some questions
3 regarding customer lists that at least one bidder is asking
4 for? Do you recall those questions?

5 A Yes.

6 Q And you said that the debtors were in the process of
7 setting up a clean room to address that request?

8 A Yes.

9 Q And I think you said that that would be done soon or
10 immanently. My question to you is do you have any concern
11 that getting that bidder access to that clean room on the
12 schedule that is currently proposed is any impediment
13 whatsoever to their participation in the sales process?

14 A No, I don't.

15 Q Second question, with respect to cure schedules there
16 were some questions about getting the cure schedules
17 completed and getting those to bidders as well. Do you
18 recall those questions?

19 A Yes.

20 Q Based on your understanding of the process of where we
21 are today and where those bidders are do you have any concern
22 that the completion of the cure schedules will somehow impede
23 those bidders ability to participate in the auction in the
24 time frames that we're asking for?

25 A No.

1 Q there was some discussion about, from multiple counsel,
2 whether or not there has been consideration of bids that
3 would pay Deerfield less than cash in full. Do you recall
4 that discussion?

5 A Yes.

6 Q Can you just back-up and tell us how you approached
7 bidders throughout this process with respect to the kinds of
8 bids that the debtor would consider and how you would
9 approach those?

10 A So, we offered to interested parties to acquire
11 individual assets, the whole company or a combination in
12 between. As part of that to the extent that a certain bidder
13 were interested in an individual asset we intend to evaluate
14 that in the context of the value received on account of all
15 assets.

16 Secondly, to the extent that an interested party is
17 offering non-cash compensation we would consider and did, in
18 fact, take that to Deerfield as our secured creditor to
19 determine whether there is interest in receipt of non-cash
20 compensation.

21 Q So, you actually jumped ahead of it, but to make sure I
22 understand you actually interfaced with Deerfield regarding
23 potential interest, regarding a bid involving a non-cash
24 take-out of Deerfield. Is that right?

25 A Correct. Through their advisor team. That is correct.

1 Q And would you continue to have that approach with
2 respect to Deerfield if any bidder indicates some sort of
3 interest to that respect?

4 A Yes. It is continued throughout this process.

5 Q Okay. Lastly, counsel for the -- not lastly, but
6 lastly with respect to the questions of counsel for the
7 creditors committee, you were asked if you have a high level
8 of confidence today that there will be another bidder showing
9 up at the auction. I believe your answer was you're hopeful.

10 A Correct.

11 Q Do you recall that testimony?

12 A Yes.

13 Q If we extend this process three more weeks is that
14 going to increase your level of confidence that another
15 bidder is going to show-up?

16 A No, it won't.

17 Q What is your concern with extending the bidding
18 procedures by the three weeks are more than people are asking
19 for?

20 A I think the continued risk to the business and the
21 continued cash burn would be a potential deterrent to value.
22 The cash burn, of course, comes out of the waterfall which,
23 therefore, would, by definition, increase what a third-party
24 would need to pay to clear Deerfield's debt.

25 Q And have you spoken with -- you have been working with

1 the debtors' management team as well in terms of thinking
2 about the required timeframe for getting this bidding process
3 done?

4 A Yes.

5 Q As you sit here today is there anybody on the debtors'
6 management team or yourself that would like to have an
7 additional four weeks to market this business?

8 A No.

9 Q Counsel for Vatera asked you about an ABL. Do you
10 recall those questions?

11 A Yes.

12 Q Has Vatera come to the debtors' proposing an ABL?

13 A No.

14 Q Is there anything prohibiting Vatera from proposing an
15 ABL?

16 A Not that I'm aware of.

17 Q Do you think that Vatera has access to the documents
18 that counsel was asking you about a little bit ago?

19 A I do.

20 Q But Vatera hasn't come forward so they would like to
21 propose an ABL, is that right?

22 A That's correct.

23 Q And if anybody in the world comes forward and wants to
24 talk to you about financing what is your approach going to
25 be?

1 A We'll evaluate it.

2 Q Lastly, with respect to the breakup fee you were asked
3 if Deerfield has told you unequivocally that they would walk
4 away from this transaction absent a breakup fee. I want to
5 talk just a minute about the value of the Deerfield
6 transaction.

7 Why is it important to the debtors to maintain the
8 Deerfield stalking horse bid?

9 A It provides certainty of an outcome and a floor of
10 value against which potential interested parties can bid.

11 Q In addition to just taking their collateral what other
12 benefits to the debtors does the Deerfield bid provide?

13 A They will be paying administrative expenses assuming
14 certain contracts.

15 Q And do you think if the Deerfield bid goes away there
16 is something other than simply walking away or could the
17 debtors be in a worse position with respect to Deerfield then
18 they are today?

19 A I believe the debtors would be in a worse position.

20 MR. HOGAN: Nothing further, Your Honor.

21 MR. MARTIN: Re-cross?

22 THE COURT: Yes.

23 RECROSS EXAMINATION

24 BY MR. MARTIN:

25 Q Have any of the bidders had access to management

1 meetings without you being present or someone from your team?

2 A I don't believe so.

3 Q But Deerfield has access to management, isn't that
4 correct?

5 A I believe they have.

6 Q With respect to the -- we talked about cure schedules
7 for executory contracts.

8 A Yes.

9 Q By the way, to your knowledge, are there a significant
10 number of executory contracts that need to be considered in
11 this transaction?

12 A I am not the individual preparing that schedule.

13 Q Okay. Under the current scheduled proposed by the
14 debtor I believe the bid deadline is February 10th?

15 A That's correct.

16 Q Section 4(g) of the bid procedures, which can be found
17 at Docket Number 67-3 at Page 8 of 18, reads the following:

18 "A bid must identify any and all executory contracts
19 and unexpired leases of the debtors that the potential bidder
20 wishes to be assumed."

21 Can you explain to me how a bidder might be able to put
22 that together by February 10th when it still has not been
23 provided?

24 A My understanding is that the schedule will be provided
25 shortly and I believe the bidder will have enough time to do

1 that.

2 Q I am going to refer to the debtors' motion itself,
3 Docket Number 67, at Page 25 of 49. That reads contract
4 assumption notice:

5 "No fewer than 14 calendar days prior to the sale
6 objection deadline the debtors shall serve a notice of
7 contract assumption on all counter parties to all contracts
8 expected to be designated contracts 14 days prior to sale
9 objection deadline."

10 And if you look elsewhere in the order the sale
11 objection deadline is proposed to be February 7th. So, if my
12 math is correct that date has passed already that the debtors
13 were supposed to provide an assumption notice. Is that
14 correct?

15 A Based on what you described, yes.

16 Q And you haven't seen a list of contracts to be assumed
17 or cure amounts?

18 A I have not.

19 MR. MARTIN: No further questions.

20 THE COURT: Thank you.

21 RECROSS EXAMINATION

22 BY MR. GALARDI:

23 Q Just following up on -- you were asked a question by
24 your counsel that the debtors would be worse off without the
25 floor bid, correct?

1 A Correct.

2 Q And you said yes?

3 A Yes.

4 Q Okay. And when you said the debtors would be worse off
5 I want to understand that. Who wouldn't be paid in that
6 circumstance?

7 A I don't know the answer until I see where value comes
8 out.

9 Q Okay. But if they foreclosed on their collateral,
10 let's take the -- have you ever done a UCC foreclosure?

11 A I have not.

12 Q Okay. And so you didn't compare this to a UCC
13 foreclosure, correct?

14 A I did not.

15 Q Okay. And let me ask you, do you think that the
16 professional fees would be paid in a UCC foreclosure of your
17 firm?

18 A I believe potentially not absent their payment.

19 Q Okay. So, you would be one of the parties that would
20 be hurt in that circumstance, correct?

21 A I suppose.

22 Q And you believe you're providing value to Deerfield by
23 doing that process, correct?

24 A I don't follow.

25 Q Do you believe that your efforts to sell the assets are

1 providing value to Deerfield in this process?

2 A I do.

3 Q Okay. And do you believe that Skadden would be paid in
4 a foreclosure?

5 A Potentially not.

6 Q Okay. And do you believe that Skadden's services are
7 providing value to Deerfield in this process?

8 A I do.

9 Q Okay. Now when you considered -- and so do you believe
10 that Deerfield wants to buy these assets?

11 A I do.

12 Q And do you believe that it would pay the vendors that
13 it thinks are necessary if it had to foreclose on the assets?

14 A I believe that is reasonable.

15 Q Okay. So, it would still be paid, right?

16 A Yes.

17 Q Okay. Do you think that they would still try to assume
18 or get assignments of the contracts that they want in this
19 transaction if they had to foreclose?

20 A Potentially.

21 Q Okay. So, they won't be any worse off, right?

22 A Potentially not.

23 Q So, when you said the debtors will be worse off who is
24 really worse off?

25 A I think it puts at risk the business itself,

1 potentially employees.

2 Q Let's talk about the employees. Do you think Deerfield
3 is going to take -- I think in somebody's declaration, it
4 might have yours, does Deerfield have a management team
5 presently for this business?

6 A It was not in my declaration.

7 Q Do you know if Deerfield has a management team for this
8 business?

9 A I don't.

10 Q Okay. Do you know if they have any employees for this
11 business?

12 A I don't.

13 Q Do you know if they're intending to retain the
14 management for the go-forward business?

15 A I don't know what they're specific plans are with
16 regard to the employee team.

17 Q Okay. So, you don't know whether employees would be
18 harmed or not harmed. Isn't that correct?

19 A I don't.

20 Q Okay. Now one other question. In considering the \$2
21 million dollar expense reimbursement you're not testifying
22 today on the cash collateral order, correct?

23 A That is correct.

24 Q Okay. So, you did not consider, in looking at the
25 expense reimbursement of \$2 million dollars, the additional

1 adequate protection payments of \$1 million dollars, is that
2 correct?

3 A I don't follow the question.

4 Q In determining that the \$2 million dollar fee for
5 expense reimbursement was reasonable, in your words, did you
6 consider that in the cash collateral order there's a 500,000
7 fee, we call it a break-up fee or an adequate protection
8 payment, and an extension fee of \$500,000 dollars. Did you
9 consider that when you came to the view that \$2 million
10 dollars was reasonable?

11 A I'm familiar and I recall those were hard-fought
12 negotiations.

13 Q My question is not that, sir. My question is did you
14 consider that when you opined before that the \$2 million
15 dollar expense reimbursement was reasonable?

16 A I did not.

17 MR. GALARDI: Thank you. No further questions.

18 THE COURT: Any redirect?

19 MR. HOGAN: Yes.

20 REDIRECT EXAMINATION

21 BY MR. HOGAN:

22 Q Mr. Finger, have you ever seen a pharmaceutical company
23 in bankruptcy flip to a UCC foreclosure sale?

24 A No.

25 Q How do you think that would hold together in the

1 market?

2 A I believe it would be a negative for the business
3 itself.

4 MR. HOGAN: Nothing further, Judge.

5 THE COURT: Okay.

6 MR. LANDIS: Your Honor, excuse me, for the record
7 Adam Landis from Landis Rath & Cobb on behalf of Deerfield.
8 I am not signed in on your sign-in sheet. We were using the
9 time Your Honor graciously offered before the hearing in one
10 of the outside break rooms when it was time to sign-in. So,
11 I didn't sign-in. Mr. Bromley didn't sign-in as well. He
12 would like to ask a few questions of the witness if he may.
13 There has been a lot of rapid back and forth.

14 THE COURT: Okay. We're somewhat out of order, but
15 I'll permit and we're going to start another round then.

16 MR. LANDIS: Thank you, Your Honor.

17 MR. BROMLEY: Thank you, Your Honor. James
18 Bromley of Sullivan & Cromwell. I apologize. It's not
19 really -- I'm here on behalf --

20 THE COURT: Sure were to jump in.

21 MR. BROMLEY: Yeah, I'm here on behalf of
22 Deerfield, so as far as I can tell I'm being shot at from
23 several directions, so I apologize for that.

24 DIRECT EXAMINATION

25 BY MR. BROMLEY:

1 Q Mr. Finger, I just have a couple of questions for you.

2 You're not a lawyer, right, Mr. Finger?

3 A Correct.

4 Q And so, when you talked about familiarity with various
5 documents, you haven't read those documents as a lawyer,
6 correct?

7 A Correct.

8 Q Are you aware of a subordination agreement that exists
9 between Vatera and Deerfield?

10 A I believe there is an agreement, yes.

11 Q Okay. And as a non-lawyer, generally, you understand
12 that subordination agreement means that one party is
13 subordinated in terms of its rights to another?

14 A Yes.

15 Q And, generally, as you're sitting here today, you
16 understand that the subordinated party in connection with
17 that subordination agreement is Vatera, vis-à-vis, Deerfield,
18 correct?

19 A That's correct.

20 Q Okay. And so, when you were talking about certain
21 things with Mr. Galardi about the ability to agree to certain
22 things because of Deerfield's ability or right to consent,
23 you understood that the right to consent that Deerfield has
24 exists within those documents, correct, those legal
25 documents, right?

1 A Yes.

2 Q So and that as far as you're concerned as a financial
3 professional, you were aware that Deerfield had certain legal
4 rights and was exercising those rights, correct?

5 A That's correct.

6 Q Okay. Now with respect to a UCC foreclosure, I think
7 the first question that Mr. Galardi asked you is do you know
8 what a UCC foreclosure is and I think your answer was no, is
9 that correct?

10 A I'm familiar with it.

11 Q But you've never --

12 A No.

13 Q -- involved in one?

14 A No, sir.

15 Q You don't know how one is conducted?

16 A No.

17 Q You don't know whether contracts are available to be
18 assumed in connection with a UCC foreclosure?

19 A No.

20 Q You don't know whether or not certain intellectual
21 property rights can be transferred in a UCC foreclosure?

22 A No.

23 Q You don't know whether a company can continue to
24 operate during the pendency of a UCC foreclosure?

25 A I don't.

1 Q You don't know whether Deerfield's cash collateral
2 would be available to fund the operation of the business
3 during such a foreclosure?

4 A I don't.

5 Q Okay. You don't know whether vendors would be able to
6 be assumed and assumed in connection with a UCC foreclosure?

7 A I don't.

8 Q So it's fair to say that in connection with whatever a
9 UCC foreclosure is, you're not an expert and don't know how
10 they would be conducted, fair?

11 A That's fair.

12 Q Okay.

13 MR. MARTIN: Your Honor, I'm not rising the out of
14 order thing. This is direct, I think, by Mr. Bromley who
15 supports it and it just sounds a lot like cross.

16 THE COURT: Meaning it sounds leading?

17 (Laughter)

18 MR. MARTIN: Oh, yes. I want us to get through
19 the calendar and so, I didn't rise, but I guess I would just
20 like to, with the court's -- if the court is with me, I'd
21 like to caution Mr. Bromley.

22 THE COURT: I think you should ask non-leading
23 questions.

24 MR. BROMLEY: Thank you, Your Honor. And I would
25 note that simply because they're against me doesn't mean that

1 I'm the movant.

2 THE COURT: That you're with anyone.

3 (Laughter)

4 MR. BROMLEY: That's absolutely the case, Your
5 Honor.

6 BY MR. BROMLEY:

7 Q So, okay, Mr. Finger, you're familiar with -- are you
8 familiar with the term financial buyer?

9 A Yes.

10 Q And what does that mean?

11 A Financial buyer, financial sponsor. One that does not
12 own or operate a strategic asset.

13 Q And are you familiar with the term strategic buyer?

14 A I am.

15 Q And can you tell me what you mean by that?

16 A A company with operations potentially similar to the
17 debtors or tangentially related sectors.

18 Q So, let me ask you a question. Is there, in your
19 experience, a difference between what a strategic buyer and a
20 financial buyer would require of an acquired company?

21 A Yes.

22 Q And could you explain that difference?

23 A I believe that a strategic buyer, depending on what
24 sector they're in and what portfolio they have may require
25 more or less of company's operations but a financial buyer is

1 effectively likely to buy the whole company.

2 Q And Deerfield is what kind of buyer?

3 A I believe financial.

4 Q And the plan proposal that has been put forward for
5 which we're discussing the bidding procedures, is that an
6 acquisition of the entire company?

7 A Yes.

8 Q Okay. And that -- what does that mean in terms of
9 employees?

10 A So, I don't know Deerfield's plan specifically with
11 respect to the employees; however, I would assume that
12 Deerfield will seek to hire most of the employees?

13 Q And is that consistent with your experience with
14 financial buyers?

15 A Yes.

16 Q And in your experience with financial buyers, what do
17 they generally do with most of the vendor relationships?

18 A I think they likely assume them.

19 Q And is that your expectation in this situation?

20 A It is.

21 Q And what is your experience in terms of financial
22 buyers with respect to customer relationships?

23 A I would believe they would like to assume those as
24 well.

25 Q And is that what you're expecting in the situation out

1 of Deerfield?

2 A Yes.

3 Q And if you had a -- is a big pharma company like a GSK
4 or a Merck is that a strategic buyer as an example?

5 A Yes.

6 Q And if the strategic buyer of that sort were to arrive
7 do you think there would be a higher or lower chance that
8 they would take the employees of the company?

9 A I think lower likely because of the synergy
10 opportunity.

11 Q Do you think it's substantially lower?

12 A From a probability perspective, yes.

13 Q Okay. And rather than repeat all the questions, would
14 that be the same with respect to customers and vendors?

15 A Vendors, yes; customers, I suppose it depends.

16 MR. BROMLEY: That's all I have, Your Honor,
17 reserving rights. Thank you.

18 THE COURT: Thank you.

19 Did that prompt any questions from anyone?

20 MR. GALARDI: I hate to say it, it does prompt
21 two.

22 THE COURT: Mr. Galardi.

23 CROSS-EXAMINATION

24 BY MR. GALARDI:

25 Q Mr. Bromley just asked you about the consent word that

1 you used when I was cross-examining you, have you ever read
2 the subordination agreement?

3 A No.

4 Q And when you used the word consent when I asked you,
5 did you understand Deerfield had to consent, were you
6 thinking of the subordination agreement or, in general?

7 A I am aware there's an agreement in place. I don't
8 follow the question.

9 Q Well you said because we didn't think Deerfield would
10 consent. Those were your words, or thereabouts. We don't
11 have a transcript. And I'm just simply asking when you used
12 those words, was the subordination agreement in your head or
13 was it just generally Deerfield needed to consent?

14 A I'm not sure.

15 Q Okay. Thank you.

16 CROSS-EXAMINATION

17 BY MR. MARTIN:

18 Q Mr. Finger, you've asked the question point blank of
19 Deerfield over the last month or so will you take a penny
20 less than the \$140 million credit bid amount, and the answer
21 has been no, isn't that correct; in cash, in full, in cash?

22 A Yes.

23 MR. MARTIN: Nothing further.

24 THE COURT: Thank you. Mr. Finger, you may step
25 down.

1 THE WITNESS: Thank you.

2 (Witness excused)

3 THE COURT: We're going to take five minutes and
4 then we'll get to the next witness.

5 (Recess at 3:43 p.m.)

6 (Proceedings resume at 3:57 p.m.)

7 THE CLERK: Please rise.

8 THE COURT: Please be seated.

9 Okay. Mr. Milligan, take the stand, please.

10 PETER MILLIGAN, WITNESS, SWORN

11 THE CLERK: Please state your full name, spell
12 your last name for the record?

13 THE WITNESS: It's Peter Milligan; M-I-L-L-I-G-A-
14 N.

15 THE COURT: Must be missing some people. Are they
16 just out in the hallway? Thank you.

17 Mr. Martin.

18 MR. MARTIN: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. MARTIN:

21 Q Mr. Milligan, you're aware of the \$140 million dollar
22 credit bid?

23 A Yes, sir.

24 Q And are you also aware that a portion of that bid, and
25 particularly, \$5 million dollars represents unfunded debt?

1 A I am.

2 Q Okay. And just explain how that \$5 million dollar
3 piece of the debt occurred?

4 A Sure. The debt was originally issued at about \$150
5 million. We approached Deerfield in the fourth quarter of
6 2018 to renegotiate our loan agreement which required a few
7 accommodations.

8 One was to lower the sales covenant for 2019. The
9 other -- major changes; the other change was to remove the
10 going concern limitation in the audit that would be -- audit
11 opinion that would be issued in 2019.

12 And as a result of that, we did two things. On the
13 other side, if you will, the equation was to increase the
14 exit fee. I believe it was from 2 percent to 4 percent and
15 added \$5 million dollars to the outstanding balance.

16 Q Without any additional cash having been advanced by
17 Deerfield?

18 A That's correct.

19 Q And now these two changes, the two covenants you
20 negotiated, what was the sales covenant originally?

21 A For 2019, it would have been \$75 million.

22 Q And what was it lowered to under the agreement?

23 A \$63.8.

24 Q I thought you testified --

25 A I did, and I apologize. I said \$67 this morning, but

1 it was \$63.8.

2 Q Okay. So from \$75 million in sales a year to \$63.8
3 million in sales. And the second item was, I believe you
4 just said the going -- that if there were going concern
5 footnote, that would not be a default.

6 A Right a going concern opinion would have been a default
7 condition.

8 Q And in return for those two things, the company agreed
9 to increase the loan balance by \$5 million without additional
10 cash changing hands?

11 A Yeah, there was a number of things. That was one.

12 Q Okay. You also testified today that the company is
13 currently or sitting on, I'll say, approximately \$80 million
14 in book value inventory?

15 A That's correct.

16 Q And about \$40 million in cash?

17 A The cash balance today is a little -- about \$52
18 million.

19 Q Okay. And about \$8 million in receivables?

20 A Approximately.

21 Q Okay. 88, 52, I get \$140 million right there. The
22 company is also holding about -- well before I get to that.
23 The company also has intellectual property?

24 A Yes, sir.

25 Q And I believe you testified today that in your view the

1 intellectual property and the products themselves are the
2 most valuable part of the company's assets?

3 A I think they are.

4 Q More valuable than the \$50 million in cash?

5 A Yes.

6 Q And in addition, but we don't know exactly what the
7 intellectual property is worth, so we've got \$140 million of
8 the things we added up, plus an unknown amount for
9 intellectual property. And, in addition, there's an asset
10 that Deerfield is in a unique place to acquire which is \$350
11 million of NOLs, net operating losses.

12 A Yeah, that's correct.

13 Q Okay. And I believe you testified that in your
14 experience you actually ran a tax group for AT&T?

15 A I was part of it; didn't run it, but I was part of it.

16 Q All right. Any -- what's your opinion of the value of
17 \$350 million of NOLs?

18 A Yeah, the way that I would approach valuing that
19 because of the limitations under Section 382 that could be
20 triggered, and a lot of instances which I'm certainly not an
21 expert on, you would have to look at the company's ability o
22 generate \$350 million dollars of taxable income to offset
23 those.

24 You would first assume that. You would take that over
25 a time period, assuming it's x amount of years. You would

1 put a discount rate on that to account for probability of
2 that happening, and then discount that all back to current
3 value, and then multiply it by the tax rate in effect at the
4 time and that could change, but today in the corporate side,
5 it's 21 percent.

6 Q Right. So if you could use all those NOLs, 21 percent
7 times \$350 million is \$73 million of actual cash savings; of
8 course, as you said, has to be discounted to present value?

9 A Correct.

10 Q Thank you.

11 MR. MARTIN: No further questions.

12 THE WITNESS: Sure.

13 THE COURT: Mr. Galardi.

14 CROSS-EXAMINATION

15 BY MR. GALARDI:

16 Q The bid is \$140 million dollars, correct?

17 A Correct.

18 Q Okay. And did you determine the number \$140 million?

19 A I did not.

20 Q Who did?

21 A Understanding of our advisor team that in satisfaction
22 of all the outstanding Deerfield loan that that was the way
23 the number is determined.

24 Q So is it your testimony, as you sit here today, that if
25 \$140 million dollars of cash came in, leave aside assets,

1 \$140 million, Deerfield is paid in full, period, end of
2 story, over?

3 A No.

4 Q Why not?

5 A Well this is a question I actually, I'm not totally
6 sure on because I don't know what happens when you're in
7 default, but there's exit fees, and there's potential make
8 wholes that existed outside of the bankruptcy. I don't know
9 if their existence today.

10 Q Okay. And do you know whether those would be secured
11 claims?

12 A I do not know.

13 Q Okay. And has Deerfield reserved the right to assert
14 that their secured claims?

15 A I don't know that.

16 Q And do you have an agreement with Deerfield that it
17 will not bid those claims in any auction?

18 A I don't think we have that.

19 Q Okay. So, it's possible that Deerfield may add claims
20 at the auction that we're unaware of as you sit here today?

21 A I would defer to those who structured the agreement.

22 Q Okay. Now in the bid procedures, there's an agreement
23 to pay \$2 million dollars of an expense reimbursement,
24 correct?

25 A In it, yes.

1 Q Do you understand that to be a secured claim or an
2 unsecured claim?

3 A I don't know.

4 Q Okay. So, you don't know whether they can credit bid
5 that?

6 A I do not.

7 Q Okay. And in the cash collateral order, you did -- and
8 note this is not about that. But in the cash collateral
9 order there are two other fees, \$500,000 dollars and another
10 \$500,000 dollars. We call them a breakup fee and an extension
11 fee; are you aware of those fees?

12 A I am.

13 Q And do you have any understanding that if the cash
14 collateral order is approved, they would be able to bid that
15 million dollars?

16 A I do not know.

17 Q Okay. Now if you don't know, who would, from the
18 company's standpoint? Not your advisors, who from the
19 company would know?

20 A Who from the company would know? I'm not sure.

21 Q Now on the NOLs, you just went through a list of
22 intellectual property that is some value. You went through
23 the cash and you went through the receivables. Is the debtor
24 getting any cash, any value from Deerfield allocated to the
25 NOLs it would acquire?

1 A The credit bid doesn't distinguish what asset its
2 bidding on, it's bidding on the whole.

3 Q Are you familiar what a credit bid means?

4 A Somewhat.

5 Q Let me -- I'm just testing your understanding. I'm not
6 asking for a legal question. Can you credit bid on the NOL?
7 Can somebody credit bid on an NOL?

8 A I do not know.

9 Q Did you ask any lawyer about that question?

10 A No.

11 MR. HOGAN: Judge, just objection -- we're outside
12 the scope of (indiscernible - counsel away from microphone).

13 MR. GALARDI: Your Honor, it goes to the bid. It
14 goes to the bid amount.

15 MR. HOGAN: (indiscernible)

16 THE COURT: I'm going to let him ask the question.
17 Overruled.

18 MR. GALARDI: I think he answered it already, so
19 we're not going to strike it.

20 THE COURT: Okay.

21 BY MR. GALARDI:

22 Q You too say in your declaration at paragraph seven that
23 you consider it highly doubtful that any other bid will come
24 in, correct?

25 A I did.

1 Q And on what basis do you say that?

2 A On the basis that we have been looking at alternatives
3 for many cores.

4 On the basis that, even back into 2018, there were
5 conversations with folks to look for alternatives.

6 On the basis that in the summer of spring of 2019, we
7 had a number of parties reach out to us and then followed up
8 with a number of parties who had reached out previously and
9 tried to get what their view of value would be.

10 On the basis that the current bidders or that are in
11 the process today have been in and around the data room for
12 many, many months and in context with that my understanding
13 and my belief is that the Jefferies team has reached out to
14 every possible player.

15 The fact that the process is a very public one and
16 folks would have the understanding that the company, of
17 course, is being auctioned.

18 On the notion that in the context of this process, we
19 have uploaded over 1200 documents to the data room and
20 answered over 900 requests that are serving independent of
21 any request we received from the secured lender.

22 Q Okay. So, you just -- now we're going to have to
23 unpack it. I'm sorry.

24 A That's okay.

25 Q Deerfield has not yet determined what contracts to

1 assume or reject, is that correct?

2 A That is my understanding, yes.

3 Q Okay. And how long is Deerfield been doing due
4 diligence on this business?

5 A They have -- well, they've done due diligence, I'm
6 sure, since their original investment. With respect to this
7 credit bid, I believe they started doing due diligence
8 probably in the October timeframe.

9 Q So do you think Deerfield has a very good idea of what
10 contracts the company has, what relationships it has?

11 A I believe they have a very good understanding of all
12 the material ones, absolutely.

13 Q Okay. And, yet, it still has not identified which
14 contracts to assume and which to reject?

15 A It hasn't identified that to me, for sure.

16 Q Okay. And is it your testimony that another buyer can
17 do within ten or -- within a week or two?

18 A Yeah, the material contracts have been loaded up into
19 the data room for a significant period of time and could they
20 do that due diligence in that period of time, my assumption
21 would be yes.

22 Q Okay. Now in paragraph seven I think one of the
23 modifications to your testimony was you had -- it said the
24 thirteen-week budget that governs the debtors' use of cash
25 collateral, the debtors' average weekly net cash flow is

1 approximately negative \$1.3 million dollars, correct?

2 A Correct.

3 Q That's what you said in your declaration, and that's
4 the statement you corrected or your counsel corrected in the
5 proffer.

6 A Clarified.

7 Q Clarify. Okay. And of that \$1.3 per week, how much is
8 associated with professional fees?

9 A Well on the \$1.3 basis or the \$1.1?

10 Q On the \$1.1 basis.

11 A On the \$1.1 basis, it's probably about \$600,000.

12 Q Okay.

13 MR. GALARDI: I have no further questions, Your
14 Honor.

15 THE COURT: Thank you.

16 Ms. Richenderfer. Mr. Bromley.

17 MR. BROMLEY: Do we -- okay --

18 THE COURT: Yeah before you again.

19 MR. BROMLEY: Thank you, Your Honor, for
20 clarifying the order.

21 CROSS-EXAMINATION

22 BY MR. BROMLEY:

23 Q Mr. Milligan, I just have a couple of questions.

24 When Mr. Martin had asked you about inventory --

25 A Yes, sir.

1 Q -- right, I think you mentioned the number \$80 million.

2 A Correct.

3 Q Is that book value?

4 A That's book value.

5 Q Okay. And what do you mean by book value?

6 A That essentially is the value that we have acquired the
7 asset for, and then we revalue it according to the accounting
8 rules. And if you believe that you can use that inventory
9 over a certain period of time then you keep it on the books
10 at that level. If you don't, then you would write down that
11 inventory to reflect the ability to use it.

12 Q Now that inventory is comprised of what?

13 A It's comprised of the API which is the frontend, which
14 is the active pharmaceutical ingredient. And for the most
15 part, it's that and then some finished goods.

16 Q So of the \$80 million, do you have an estimate as how
17 much is the frontend?

18 A Yeah, the frontend of that inventory is probably \$70
19 million and of that seventy, there's \$43 million that we
20 treat as inventory, according to the accounting rules what
21 is, in fact, prepaid commitments that we haven't purchased
22 yet, but they are commitments for inventory and we classify
23 them as inventory.

24 Q How much of that inventory would you say are regulated
25 goods?

1 A One hundred percent.

2 Q And regulated by whom?

3 A Regulated by the FDA.

4 Q Do those goods expire, do they have a --

5 A Yes.

6 Q They have a life span?

7 A Yes, each one has a different life span. It depends on
8 what part of the process you're in. If you're on the API
9 level, each chemical compound of which four drugs, each one
10 has their own. They each have different expirees. There are
11 things that companies can do and do to make sure that they
12 can try to extend that.

13 You can test on the product to keep it on stability to
14 invest limited resources in making sure that the chemical is
15 not degrading. And as a result of that, you may be able to
16 petition the FDA for an extension. Our assumption in that
17 inventory is that inventory from the beginning to end in that
18 full dollar amount is probably salable for, you know, close
19 to ten years.

20 Q So, when I said the word regulated does that mean that
21 people who would be potential purchasers of that inventory
22 need to be approved in order to do that?

23 A My understanding is, this is not my area of expertise,
24 but that you need the proper licenses in order to be able to
25 sell pharmaceuticals.

1 Q Now and have you undertaken any investigation as to how
2 you would sell the inventory in a non-whole company exercise?

3 A Yes, and we had some success on that in the end of the
4 year where we sold a piece of it to one of our licensing
5 partners. That sale took place at the end of the year. It
6 was \$9.8 million dollars in cash which is in the numbers that
7 we've talked about. And it essentially is a sale of some of
8 that prepayment commitment to our license partner in Europe
9 Menarini.

10 Q Now with respect to the NOLs, there were a number of
11 questions that were asked. When you were at the tax group at
12 AT&T, were you involved in NOLs?

13 A I certainly have an understanding of net operating cost
14 calculation, sure.

15 Q Okay. And it's true, is it not, that in order to take
16 advantage of NOLs, you have to earn taxable income, I think
17 you said that?

18 A Yes.

19 Q Okay. And the generation of the net operating losses
20 is because it's due to the fact that the company has
21 consistently lost money, correct?

22 A Correct.

23 Q Right. And the projections that the company has are
24 not that the company will make money to access these NOLs,
25 correct?

1 A The level of NOLs we have forecasted for three years,
2 so over that period of time certainly not.

3 Q And so in that period of time, over that three-year
4 forecast, what is your forecast of using any of those NOLs?

5 A Probably a slight amount in 2021.

6 Q And so that in the third year out is the first year
7 that you can anticipate under current projections that you
8 would have any ability to use the NOLs?

9 A That's correct.

10 Q Okay. And the -- are you aware of the 382 limitations?

11 A Somewhat.

12 Q And is it fair to say that the Internal Revenue Code
13 prohibits the sale of NOLs separate and apart from
14 businesses?

15 A I think that was the essence of those rules.

16 Q Right. So, you are familiar that 382 was enacted to
17 prevent the trade --

18 A Trafficking and losses, yes.

19 Q Right. So, you're familiar with the fact that in order
20 to utilize NOLs in a transactional setting that there needs
21 to be a purchaser who has the ability to use those NOLs,
22 correct?

23 A Correct.

24 Q And you understand that Deerfield is one of those?

25 A I believe that they are one of the few that could do

1 that, yes.

2 Q And Vatera is another, correct?

3 A Correct.

4 Q And Vatera hasn't made any proposals in order to
5 utilize the NOLs, correct?

6 A No.

7 Q Okay. Indeed, the only thing Vatera has done is
8 threaten to destroy the NOLs, correct?

9 A I don't know what they've done.

10 Q Well, I suggest you listen to the argument.

11 A It may have been too subtle for me.

12 Q Oh, we're getting to that. I'm sorry.

13 With respect to the thirteen-week budget, effectively
14 what is happening is the company is losing cash at a million
15 three a week, correct?

16 A Yeah, I mean I can clarify the million three versus
17 million, one million three is the right number. And the
18 clarification was that million three was essentially the
19 difference of that. It's \$200,000 per week that we're
20 putting essentially defer to administrative claims because of
21 this process.

22 So, \$2.5 million dollars or so over that thirteen-week
23 period, that's the difference between a million and one
24 million three in that million one, as I think I referenced
25 earlier about \$500,000 or so of the operating losses.

1 Q Now have you rolled out the thirteen-week budget beyond
2 what was in your first day declaration?

3 A No.

4 Q And do you have -- have you done any preparation in
5 connection with that?

6 A Significant.

7 Q Okay. And what is your expectation for losses beyond
8 the thirteen-weeks?

9 A Yeah, so for the full year of 2020, our projection that
10 is in the data room which is on a pro forma basis of January
11 1st if we were on our own, if you will, on January 1st. The
12 model that's in the data room for potential bidders, I
13 believe is \$22 million of loss.

14 Q Twenty-two million of additional loss?

15 A Of EBITDA, that's not cash flow, although we can, you
16 know, there's a very subtle difference there because it's an
17 analysis reconciliation between the two, but for 2020 those
18 numbers are very close.

19 We've updated that recently and think we're doing a
20 little bit better, so probably minus \$20 million dollars for
21 2020.

22 Q So the cash, the \$52 million in cash would be at
23 current estimates by year end down to \$32 million?

24 A Yeah, I mean, yes, on its own, but that is sort of a
25 hypothetical because that assumes there's no restructuring

1 cost. And if we were not in restructuring it does include
2 interest expense, so it's a hard comparison.

3 Q Okay. So when you add in the restructuring cost
4 because I counted I think forty people in this room who I
5 think, let's assume, thirty of them are on your payroll at
6 the moment, the expectation would be that that number from a
7 cash burn perspective, not an EBITDA perspective, would
8 increase, correct?

9 A That number is the number that I referenced. We expect
10 total restructuring cost for this business for third-party
11 advisors to be somewhere in the \$25 million dollar range and
12 going up.

13 Q And so, when we take the \$52 million, deduct out the
14 twenty of performance related deterioration and deduct out
15 the \$25 million of cost and expenses that are anticipated
16 with respect to the restructuring, we're down to a cash
17 position that's in the single digits, correct?

18 A I believe -- that's correct.

19 Q And you understand that all of the cash is cash
20 collateral Deerfield, correct?

21 A I do.

22 Q Okay. Thank you.

23 A You're welcome.

24 MR. BROMLEY: No further questions for the moment,
25 Your Honor.

1 THE COURT:

2 MR. HOGAN: I just have a few follow-up questions.

3 REDIRECT-EXAMINATION

4 BY MR. HOGAN:

5 Q Mr. Milligan, you remember the discussion about the
6 value of inventory and the value of cash and the value of
7 receivables and the value of IP, do you remember that
8 discussion?

9 A I do.

10 Q I don't want to talk about valuation. I just want to
11 ask you are the documents and the information related to
12 inventories in the data room --

13 A It is.

14 Q Cash that's available to bidders in the data room?

15 A It is.

16 Q Receivables that's in the data room?

17 A Yes.

18 Q IP that's in the data room?

19 A Yes.

20 Q Great. So, we're running a market process right now.
21 We're going to figure out what the value of that is.

22 Second question. Mr. Galardi asked you about details
23 about what's going to constitute a credit bid, and then he
24 asked you put aside your advisors, who at the company knows
25 this. So, maybe I missed it. I hope we're not

1 (indiscernible). Are you going to go to the auction without
2 your advisors?

3 A I will not.

4 Q Okay. So, Skadden and your financial advisors are going
5 to be there in terms of the legal (indiscernible). You're
6 not a lawyer, are you?

7 A I am not.

8 Q Thanks.

9 MR. HOGAN: Nothing else.

10 RECROSS EXAMINATION

11 BY MR. MARTIN:

12 Q Net operating losses have a twenty-year lifespan from
13 generation?

14 A I think that rule has changed, but I'm not sure. I
15 thought it changed when the tax law changed, but it's easy to
16 confirm.

17 Q Do you have any knowledge of whether or not Deerfield
18 has potentially another portfolio company that it could drop
19 into this company with profits?

20 A I don't know.

21 Q It would have to be in the same business under the 382
22 rules?

23 A I'm aware, more aware of the 382 rules outside of
24 bankruptcy. I know outside of bankruptcy to be able to
25 acquire a company and to sort of stuff a profitable business

1 in there it is certainly much more difficult than that.

2 Q You testified today that last spring before you had
3 Jefferies or engaged, you had your own inbound unsolicited
4 bids and they were in the \$150- to \$210 million dollar range,
5 correct?

6 A That's correct.

7 Q And they were cash free bids. In other words, they
8 would leave the cash behind?

9 A We asked for views of business on sort of a cash free
10 debt free basis.

11 Q And the cash that you had at that time was \$90 million?

12 A At the end of the second quarter, it was \$90 million.

13 Q So using your 150- to \$210 million dollar range would
14 ascribe a value of the company's assets, at least, based on
15 these expressions of interest of \$240 million to \$300
16 million?

17 A If taking those LOIs and adding the cash, yes.

18 Q And now we have a process driven by Deerfield which is
19 ascribing \$140 million cash outprice.

20 MR. HOGAN: Objection, Judge. Process
21 (indiscernible).

22 THE COURT: I'm sorry, what?

23 MR. HOGAN: Objection; process (indiscernible).

24 THE COURT: Recharacterize your --

25 MR. MARTIN: Sure.

1 BY MR. MARTIN:

2 Q We have a process that is seeking to accept a credit
3 bid from Deerfield at \$140 million.

4 A Correct.

5 MR. MARTIN: I'm going to stop there.

6 THE COURT: Mr. Galardi.

7 RECROSS-EXAMINATION

8 BY MR. GALARDI:

9 Q Very quick because Mr. Bromley asked you a couple of
10 questions.

11 Have you actually done an analysis of whether Vatera
12 could take advantage of the NOLs?

13 A No.

14 Q Okay. So when you testified that you thought it might
15 that was without any foundation, correct?

16 A No, that was what I was informed by, one of our
17 advisors. I don't remember who.

18 Q Okay. But you don't have any independent knowledge of
19 that?

20 A No.

21 Q Thank you. No further questions.

22 A You're welcome.

23 THE COURT: You may step down.

24 (Witness excused)

25 THE COURT: Do any of the objectors have any

1 evidence to put on?

2 MR. MARTIN: None from the committee, Your Honor.

3 MR. GALARDI: No, Your Honor.

4 MS. RICHENDERFER: No, Your Honor.

5 THE COURT: Okay. Thank you. Then the
6 evidentiary record is closed.

7 I'll hear argument.

8 MR. DRESSEL: Good afternoon, Your Honor. Again,
9 Christopher Dressel, Skadden, on behalf of the debtors.

10 Your Honor, as an initial matter, I want to take a
11 minute and just make a few remarks on the purposes and
12 objectives of the sale process.

13 The debtor has filed for bankruptcy after
14 executing restructuring support agreement with Deerfield.
15 We're enthusiastic about the Deerfield bid as a number of
16 attractive elements and offers, a considerable value
17 proposition to an array of constituents, most significantly
18 it is structured as a plan, rather than as a Section 363 sale
19 meaning it has a built-in path out of Chapter 11 for the
20 debtors.

21 By extension that means that administrative
22 claims, priority claims, cure claims and other similar
23 obligations must be satisfied in full which we think sends a
24 positive signal to employees, vendors, customers, and other
25 stakeholders with an ongoing interest in the debtors'

1 future's success.

2 Deerfield could have structured its proposal very
3 differently. It could have pursued a pure credit bid for all
4 the debtors' assets including all of its remaining cash
5 leaving the company with no funds, be administrative
6 creditors or, otherwise pursue a Chapter 11 plan and no means
7 of disposing of its Chapter 11 cases, other than a structured
8 dismissal or conversion to Chapter 7. The fact that
9 Deerfield didn't choose this route, I think is significant to
10 the estate and shouldn't be underestimated.

11 Arguably, in these circumstances, the debtors need
12 to continue marketing their assets post-petition. We could
13 have proceeded straight to plan confirmation. Nonetheless,
14 it was important to the debtors that they have a reasonable
15 opportunity to find and unlock any upside value above the
16 Deerfield facility. And for that reason, we insisted, in our
17 prepetition negotiations with Deerfield, that the RSA remain
18 subject to competitive bidding.

19 Negotiations over that point were spirited, to say
20 the least, with a yielded agreement on a marketing timeline
21 and process that we feel confident will yield the highest or,
22 otherwise, best offer for the company.

23 Your Honor, I'm not sure it's useful at this stage
24 to address each of the contentions of the objecting parties
25 point by point, as I think we covered that fairly

1 comprehensively in our reply, but I did want to underscore a
2 few key things.

3 First is the length of the marketing process. The
4 objecting parties tried to narrow the court's focus solely to
5 the post-petition marketing process ignoring the debtors'
6 prepetition efforts. I think that's a blanket approach, but
7 even if you accept that frame of reference, our proposed
8 marketing timeline falls comfortably within market norms for
9 a Section 363 process in this industry as the precedence
10 identified in our reply evidence.

11 At the risk of stating the obvious, you can't
12 barely assess the length and adequacy of a post-petition
13 marketing process without considering whether the debtor was
14 subject to a blackout or no shop period prior to approval of
15 bidding procedures.

16 In many situations, the debtor cannot market its
17 assets from the petition until approval of the bidding
18 procedures. So, the right frame of reference is number of
19 days from entry of the bidding procedures, the bid deadline.

20 In other situations, such as ours, however, the
21 debtor is not subject under such blackout period. In the
22 latter case, the appropriate measure is the number of days
23 from the petition date to the bid deadline.

24 So while Vatera sent it back that the bidding
25 procedures contemplate only thirteen days of marketing

1 between the bidding procedures and the proposed bid deadline,
2 that's actually a very misleading comparison from our
3 perspective.

4 On top of all of this, the debtors did, in fact,
5 conduct a formal and comprehensive marketing process over a
6 three-month period prior to the petition date. The details
7 are set out in Mr. Finger's declaration, and I won't belabor
8 them now.

9 The upshot, though, is that as Mr. Finger
10 testifies, the company has thoroughly canvassed the market
11 and has likely interacted with the overwhelming majority, if
12 not all, third-parties that might have a serious interest in
13 acquiring the company.

14 Mr. Finger further testifies that he does not
15 believe that a substantial extension of the bid deadline
16 would facilitate higher or otherwise better bids.

17 In sum, Your Honor, the record demonstrates that
18 the debtors have conducted a robust marketing effort and that
19 the proposed timeline for its potential bidders, ample time
20 to evaluate potential transaction and formulate their bids.

21 THE COURT: What about the testimony that the
22 customer list and the cure schedules have not been provided
23 yet to bidders?

24 MR. DRESSEL: Your Honor, with regard to the
25 customer list that raises, I think, concerns about

1 competitively sensitive information and we're working through
2 those issues as expeditiously as possible.

3 As Mr. Finger testified, the bidder that requested
4 it, and it's just one bidder, did not indicate that that
5 would affect disability to bid by the bid deadline.

6 As it relates to the cure schedule, Your Honor,
7 there is some ticking and tying to do on the production of
8 the actual cure document itself, but we believe that bidders
9 have ample visibility into the customers or into the
10 contractual relationships of the company through the
11 voluminous documents that have been posted to the data room.

12 I think as Mr. Milligan indicated, the debtors
13 have responded to extensive due diligence inquiries, over
14 900. We have, I think he testified, 1,200 documents in the
15 data room and that, I think, covers the majority --
16 substantially all of the company's material contractual
17 relationships.

18 So from a business diligence perspective, we're
19 absolutely confident that bidders have had ample access to
20 the information they need to understand the company's
21 contractual relationships and other business arrangements.

22 THE COURT: Has the -- I think the testimony was
23 that Deerfield has not yet identified what contracts its
24 going to take, is my recollection correct?

25 MR. DRESSEL: They've not formally identified

1 that, no.

2 THE COURT: So how are other bidders supposed to
3 bid against a contract that they don't know what contracts
4 are being taken?

5 MR. DRESSEL: Each bidder would be requested to
6 indicate in its bid package by the bid deadline which
7 contractual relationships it chooses to take.

8 THE COURT: Well I understand that, but we've got
9 a floor bid here. That's what has been told to me that this
10 is a -- sets the floor. So doesn't it matter what contracts
11 are being taken for the floor?

12 MR. DRESSEL: I think for purposes of the floor,
13 I'm not sure it does. Deerfield is taking all of the cash of
14 the company. And so, it would be paying all cure costs
15 associated with the company but it's not receiving extra
16 credit for that in its bid amount, because it is bidding for
17 all of the cash of the company. And so which contracts it
18 does or does not take would not affect the valuation of its
19 bid.

20 THE COURT: I'm not sure I knew that. So, the bid
21 is inclusive of cash.

22 MR. DRESSEL: Because it's a stock sale. So,
23 Deerfield will -- yeah.

24 THE COURT: Well, okay, fair enough. Fair enough.
25 So, the current cash positive was \$52, \$53

1 million, something like that.

2 MR. DRESSEL: That's correct.

3 THE COURT: Okay.

4 MR. DRESSEL: So, I think the key point is
5 Deerfield doesn't get extra credit, so to speak, for payment
6 of cure costs.

7 THE COURT: It gets \$53 million in cash.

8 MR. DRESSEL: That's right. And when we compare
9 bids at the auction, we'll do so on an apples to apples
10 basis. And what I mean more specifically that is when we
11 determine what a bidder needs to bid at the bid deadline in
12 order to be a qualified bid will effectively take the cash
13 consideration offered by that bidder and then we'll add to
14 the company's net cash position, forecast in that cash
15 position as of the closing date.

16 And so, to equalize Deerfield that's taking the
17 cash against third-party bidders, we essentially give the
18 third-party bidders credits for the forecasted cash amount.

19 THE COURT: Okay.

20 MR. DRESSEL: Your Honor, second point I wanted to
21 briefly address, the committee and the U.S. Trustee argue
22 that Deerfield should not be permitted to credit bid until
23 the committee's challenge period has expired.

24 The committee and the U.S. Trustee throughout
25 their two papers collectively fail to identify a single case

1 or other authority in support of that proposition which, at
2 any rate, is contrary to Bankruptcy Code Section 502(a) which
3 provides that timely filed claim is allowed unless and until
4 a party in interest objects to it.

5 In the event a committee subsequently commences a
6 challenge and that challenge remains unresolved as of the
7 auction, the court can, of course, fashion an appropriate
8 remedy at that time. There is no cause to bar the secured
9 lender from credit bidding based solely on and co-aid a
10 future challenge.

11 THE COURT: Well what do we do, what do we do if
12 we go forward with the auction and then subsequently there's
13 a challenge and it's a successful challenge, what happens?

14 MR. DRESSEL: I think the case law supports the
15 proposition that Your Honor can fashion an appropriate
16 remedy. I think there's a K-2 case cited in the Deerfield
17 reply indicates that the court may be able to require the
18 bidder to pay cash. But I think the --

19 THE COURT: And where's that cash going to come
20 from, how do I know what's going to happen there?

21 MR. DRESSEL: I think the point is that Your Honor
22 would have the flexibility to determine the appropriate
23 remedy at the time based on all of the considerations. One
24 possibility is payment of cash. But I think the overarching
25 point is that this is a future hypothetical.

1 THE COURT: It's not that hypothetical. I've got
2 a challenge deadline which we'll get to when we get to the
3 DIP financing, but I'm not inclined, I'll tell you, to
4 shorten that period.

5 So, since I'm not inclined to shorten the period,
6 it's a very real possibility that we could have an issue.
7 And I have seen it addressed before in other situations, but
8 not by a hypothetical you can get cash.

9 So, my question is what's the plan in that event?

10 MR. DRESSEL: Your Honor, I mean the answers we
11 haven't negotiated with Deerfield a specific plan B in the
12 event there is a successful challenge. We don't think there
13 will be a successful challenge. But what we do know is that
14 the case law in this district suggests that Your Honor has
15 the ability to fashion an appropriate remedy if and when
16 there is a successful challenge that may include requiring
17 Deerfield to pay cash. Maybe Deerfield will agree to pay
18 cash.

19 I think those issues, though, can be addressed
20 down the road, if and when that eventuality occurs.

21 THE COURT: I'm not sure. I'd like to understand.
22 I think the appropriate time to address it is now in terms of
23 what's going to happen. I know, at least, in other
24 circumstances that I've seen from other colleagues we know
25 what the end result is going to be and we know we have a

1 solvent entity who's backing the ability to fund that cash
2 obligation. So that's my question is what's happening here?

3 MR. DRESSEL: Your Honor, I think the short -- as
4 I indicated, Your Honor, we do not -- we have not
5 specifically negotiated with Deerfield --

6 THE COURT: That's the answer.

7 MR. DRESSEL: -- exactly what would happen in that
8 situation. But I don't think it's -- I think in other
9 situations it's also true that the answer what happens in the
10 event of a future hypothetical challenge is not answered at
11 the time that the bidding procedures are approved, and we
12 don't regard that as an obstacle.

13 THE COURT: I'm indicating I'm somewhat troubled
14 by that, although I will consider as we go along.

15 MR. DRESSEL: Your Honor, a third and related set
16 of objections speaks to the criteria for determining
17 qualified bids. In particular, the requirement that any bid
18 or combination of bid yields sufficient cash to match the
19 then prevailing credit bid amount.

20 Your Honor, as a threshold matter, I would stress
21 that the proposed procedures provide the debtors substantial
22 flexibility to consider different bid structures, as Mr.
23 Finger testified.

24 For example, bidders may bid in the form of a
25 competing plan or a Section 363 asset sale. They may propose

1 bids for all of the company. They may propose bids for only
2 certain of the company's assets.

3 The requirement that any such bid or combination
4 of bid yields sufficient cash consideration to match the then
5 prevailing credit bid is a necessary and appropriate
6 constraint given Deerfield's status as a secured lender.

7 The committee's response is to say that that may
8 be true for a Section 363 asset sale but it's not true for a
9 plan. Section 1129 affords the debtor the right to provide a
10 secured creditor treatment in the committee's view other than
11 full payment in cash, and the bidding procedures, in this
12 view, should preserve that possibility.

13 Your Honor, I think the short answer is that the
14 Bankruptcy Code also gives the debtor the exclusive right to
15 select among various plan alternatives during the debtors'
16 exclusive period, subject to the right of all parties in
17 interest to seek, to terminate, or modify exclusivity.

18 And the current circumstances, the debtors don't
19 believe that a cram-up plan would be value maximizing. And
20 the proposed bidding procedures are meant to orient bidders
21 toward the alternatives that the debtors believe are value
22 maximizing under the circumstances.

23 THE COURT: So how does that -- explain to me how
24 that plays out at the auction? There were a couple of things
25 in here that I didn't really understand how it plays out at

1 the auction, and this was one of them.

2 MR. DRESSEL: Yeah. So the short answer is that
3 any bid, whether it's a Section 363 bid or it's a plan bid
4 must offer sufficient cash consideration that when combined
5 with the debtors' forecast and net cash on hand as of the
6 closing date is sufficient to meet the then prevailing
7 Deerfield, you know, credit bid; in short, to pay Deerfield
8 in full.

9 THE COURT: And why is the debtor precluding that
10 now instead of waiting to see what actually comes in and
11 making the decision at that point in time exercising its
12 judgment that the cram-up isn't appropriate?

13 MR. DRESSEL: Because we've already determined
14 what the -- Deerfield already, at this point, has a stalking
15 horse bid for \$140 million. And so, it is effectively a
16 mechanism of determining whether someone has actually
17 submitted an overbid and, therefore, should be admitted to
18 the auction.

19 We're viewing Deerfield as a floor. And just as
20 we would --

21 THE COURT: You're viewing them as a floor, but
22 they're not a backup.

23 MR. DRESSEL: That's correct.

24 THE COURT: So are they a true floor?

25 MR. DRESSEL: We absolutely believe that they're a

1 floor. And we believe that they serve as an excellent floor,
2 I think given what we believe is the robust bid that they've
3 put on the table that we believe will preserve vendor
4 relationships, preserve employee relationships, furnish a
5 path for the debtors out of Chapter 11. We think they're an
6 excellent floor.

7 THE COURT: What if somebody else came along and
8 said, you know, I'll do a plan and I'll put in some cash,
9 some significant cash, and then I'll stretch them over a few
10 years. How do you know at the moment that's not better
11 because you don't know what that additional consideration
12 would be?

13 MR. DRESSEL: I think, at this juncture, the
14 debtors have determined that a value maximizing path for the
15 debtors is through these set of bidding procedures that we've
16 negotiated with Deerfield and that we have the right to use
17 Deerfield's cash collateral to pursue. And so, we feel that
18 guiding bidders towards options that conform with these
19 bidding procedures is the best way to maximize value and its
20 consistent with our right as a debtor within its exclusivity
21 period to choose among plan alternatives. And in exercising
22 that right, we've elected to require that any plan bid
23 provides sufficient cash consideration to pay Deerfield in
24 full.

25 THE COURT: Okay.

1 MR. DRESSEL: Your Honor, finally, the objecting
2 parties have objected to the expense reimbursement. As Your
3 Honor is aware, the expense reimbursement encompasses up to
4 two million in actual fees and expenses incurred by the
5 supporting lenders in connection with the supporting lender
6 transaction.

7 The objecting parties' question whether
8 Deerfield's proposed expense reimbursement satisfies the
9 O'Brien standard, but we suggested that's the wrong question.
10 Deerfield is entitled to payment of its fees and expenses
11 under the prepetition credit agreement and the interim cash
12 collateral, as well as the final cash collateral order,
13 preserved its reimbursement obligation as additional adequate
14 protection during the Chapter 11 cases.

15 As such, we submit that the expense reimbursement
16 may be credit bid by the secured parties at auction and/or
17 collected out of the proceeds of any sale to their collateral
18 to a third-party bidder regardless of whether it satisfies
19 the requirements for an administrative expense under O'Brien.

20 In any event, if O'Brien did apply, we believe
21 that the benefit conferred on the estate by the supporting
22 lender transactions is more than adequate to justify
23 allowance of that amount as an administrative expense.

24 THE COURT: So that's another aspect I just didn't
25 understand. Is it an expense reimbursement or is it

1 attorney's fees permitted to be paid under the prepetition
2 credit document?

3 MR. DRESSEL: I think the underlying source of
4 expense is the same, is fees incurred by Deerfield and its
5 advisors. Those are compensable either under the cash
6 collateral order or if there are amounts outstanding as of
7 the auction that haven't been reimbursed under the cash
8 collateral order. They can either be collected or credit bid
9 as expense reimbursement at the auction, but there's no
10 duplication between them. The underlying source from which
11 the fund, the expenses were generated would be the same.

12 THE COURT: So why is it being approved as an
13 expense reimbursement if they're entitled to it under their
14 prepetition credit documents?

15 MR. DRESSEL: I think they want it to be clear
16 that if there are amounts outstanding, as of the auction,
17 that haven't already been -- even though they're entitled to
18 reimbursement under the cash collateral order, there's
19 necessarily kind of a delay in a process associated with
20 them. So, at any given point on the auction date, there may
21 be remaining expenses outstanding.

22 And they want to be clear that on the auction
23 date, which is obviously a pivotal event in the Chapter 11
24 cases that they are able to collect that amount and/or credit
25 bid if they so choose.

1 THE COURT: Okay. But isn't that, again, the cart
2 before the horse? We don't know what the amount of the
3 secured claim is going to be. This one actually refused
4 confused me and I think it's tied into what the amount of the
5 secured claim is and what they can bid.

6 Are they both bidding as their secured claim,
7 subject to challenge and something we have to worry about
8 what happens if there's a successful challenge or is it an
9 expense reimbursement?

10 Can it be both, can it be the same, both at the
11 same time? How does that work?

12 MR. DRESSEL: I think it can be both at the same
13 time, right. The right to payment of fees and expenses
14 arises from their status as a secured lender entitled to
15 adequate protection. And what we see in the bidding
16 procedures is that that expense reimbursement amount is,
17 therefore, a secured claim and, therefore, something that
18 Deerfield can credit bid at auction, up to the actual amount
19 outstanding. It may be less than two million and it must be,
20 you know, reasonable and documented.

21 But whatever amount is out standing is the secured
22 claim under both the prepetition credit agreement, as well as
23 the adequate protection obligations in the cash collateral
24 order.

25 THE COURT: Assuming no successful challenge?

1 MR. DRESSEL: Assuming no successful challenge.

2 THE COURT: And an over-secured position?

3 MR. DRESSEL: Well I'm not sure I agree with that
4 because it's -- we believe that the payment of expenses is
5 part of adequate protection, so it doesn't --

6 THE COURT: Yeah, but you only get adequate
7 protection if there's a diminution in value, right? And so,
8 it's all sort of bound in. You don't get adequate protection
9 on top of your obligation. You get it to ensure your
10 obligation doesn't -- isn't diminution.

11 MR. DRESSEL: Yeah under the cash collateral order
12 they're entitled to payment and fees and expenses as adequate
13 protection for diminution and the value of their collateral.

14 THE COURT: Right. Right. And I haven't yet ever
15 had a fight to determine if, in fact, what that value and
16 whether you -- how you apply your adequate protection
17 payments to your obligation if, you know is there diminution,
18 is there not diminution, et cetera.

19 MR. DRESSEL: I --

20 THE COURT: But I guess I'm still not clear
21 exactly how that works. And, again, I think we have to
22 consider what happens in the event of a successful challenge
23 since the debtor here is bringing this timetable which we can
24 also talk about before the challenge period expires.

25 MR. DRESSEL: Yeah, I think -- again, I think our

1 position remains that a challenge can be dealt with if and
2 when it is brought. I don't think that's an unprecedented
3 result --

4 THE COURT: You're hearing me, right?

5 MR. DRESSEL: I am hearing you, Your Honor.

6 (Laughter)

7 THE COURT: Okay. I just want to make sure
8 because I'm getting the same answer.

9 Okay. What else do you want to address?

10 MR. DRESSEL: I'd like to reserve time to respond,
11 but that would conclude my initial presentation.

12 THE COURT: Okay. Thank you.

13 Mr. Bromley, do you want to add anything in
14 support?

15 MR. BROMLEY: I'd like to clarify a few things,
16 Your Honor.

17 THE COURT: Please.

18 MR. BROMLEY: First of all -- and then I'll have
19 some remarks, but I think it's important that some
20 misapprehensions be addressed.

21 Let me first talk about the cure schedules and the
22 contract lists because the fact is, Your Honor, we do not,
23 Deerfield, does not have a list of the contracts and does not
24 have a list of the cure schedule. We don't have cure
25 amounts. We don't have the contracts.

1 That is not the impression that was given by any
2 of the comments that were made, but we don't have them yet.
3 And as we've been sitting here in court, we've been informed
4 by our colleagues, back in the office that, in part, it's
5 being held up by the debtors because they want to release it
6 all at the same time.

7 But this is not so that everyone can have access
8 to it, but we do not have a list of contracts. We don't have
9 all that information.

10 THE COURT: Why isn't that problem?

11 MR. BROMLEY: Well all I'm saying is the
12 impression that's being given is that we've had it for
13 months. We don't.

14 THE COURT: Okay. Fair enough. And I'm not sure I
15 have that impression but, nonetheless, why isn't that a
16 problem that you don't have them?

17 MR. BROMLEY: Well because we're being told that
18 it will be delivered imminently. But let me -- I just want
19 to clarify that and then I'll get to a couple of the other
20 points, right.

21 On the expense reimbursement, Your Honor, this is
22 -- part of this is the confusion is that what we were trying
23 to do is to clarify both for other bidders in the process and
24 for the court what's going on. And, clearly, we have failed
25 miserably for which I apologize for our involvement in that.

1 But we have a right under our contracts to charge the debtor
2 for legal and other advisory expenses that are incurred in
3 connection with everything that's going on here.

4 When we were negotiating the cash collateral order
5 with the debtors, there was a concern raised about providing
6 the bidders with accurate information. And the idea that
7 under the cash collateral order that we are entitled to
8 adequate protection, to the extent there's diminution in
9 value, and that it is standard for cash collateral orders and
10 DIP orders to take into account the fees and expenses of the
11 lender or the provider of the cash collateral.

12 What we are trying to do is to make it clear, to
13 the bidders and to the court, again having failed to do so,
14 that we are not double-counting, that we're not looking for a
15 coverage under the cash collateral order for an expense
16 reimbursement and, at the same time, looking for an expense
17 reimbursement that we're entitled to under our documents.

18 We are trying to make it clear; we get one or the
19 other, not both. And for bidding purposes, we wanted to give
20 a signal to competing bidders what we thought that number
21 would be. So when they were putting their bid together that
22 they would have an idea of what in addition to our loan
23 amount that's being bid would be necessary in order for them
24 to put in a competing bid, because it's not just what we're
25 putting in. It's what we're putting in plus whatever expense

1 reimbursement we're entitled to under our loan agreements
2 that increases the size of our loan document or our loan
3 balance.

4 THE COURT: So, it's not a cap? It's not an
5 expense reimbursement like a cap like we would normally see
6 in a bid procedure. This is an estimate of what you think
7 your fees will be under your documents?

8 MR. BROMLEY: Right. So that we can give notice,
9 in effect, to the bidders, and we will let them know. We will
10 let the debtors know where we are and the bidders will,
11 therefore, know. But to give, you know, as a warning this is
12 out there, right. So that's what we were trying to do.
13 Obviously, we didn't do it well, but I'm trying to explain
14 it.

15 THE COURT: I got it.

16 MR. BROMLEY: Okay. So with those two points of
17 attempted clarification, Your Honor, what I'd like to do is
18 to talk about why the bidding procedures have been
19 established the way that they are from Deerfield's position,
20 right, and, of course, reserving any rights to respond to any
21 of the comments that the committee, Mr. Galardi, or the U.S.
22 trustee may have.

23 We are, you know it's one of these situations
24 where we aren't here because two years ago Deerfield made a
25 decision that it wanted to buy Melinta out of bankruptcy,

1 right. Two years ago when the money was lent, it was also
2 lent in connection with a substantial equity investment with
3 the idea that Melinta would be a ranging successful and that
4 the upside potential for Deerfield, which is a financial
5 investor, not a strategic investor, is that it would make a
6 market recovery on its debt and a homerun on its equity.
7 That's the investment thesis that Deerfield operated under
8 two years ago when it entered into its relationship with
9 Melinta.

10 We don't like the fact that we are here, right.
11 Deerfield is not happy that it has lost its equity
12 investment. It's not happy that it has to be in a situation
13 where it's defending itself with respect to money that it has
14 lent. It's not happy that it has to be in a situation where
15 it is the only potential buyer at the moment for this
16 business. But the process that has led us to this point is
17 one that absolutely highlights the need for speed.

18 The impression is that we have endless time and
19 endless money in order to rescue Melinta and the simple fact
20 is that's not true. Mr. Milligan testified very clearly that
21 this company, when taking into account the fees and expenses
22 of all of useless people in this room, except for Your Honor,
23 and --

24 THE COURT: Good catch.

25 MR. BROMLEY: And with respect to the fact that

1 the company is continuing to lose money on what its business
2 is which is selling drugs, the company is going to be near
3 out of cash, zero near out of cash by the end of the year.
4 And if things get worse, it's going to be worse much faster,
5 right.

6 So, there's a real sense of urgency. When
7 Deerfield was sitting, talking with the debtors last weekend,
8 the creditors committee, one of the things that we were
9 focusing on was what can be done in order to stabilize this
10 business and how long does that stabilization need to take
11 place.

12 We're talking about a company of 150 or less
13 employees. The sales force is critical. We spent an hour
14 earlier and it is so important that these people who are out
15 in the field are able to be confident that when they walk in
16 to meet their next client that they know that their car
17 expenses and their hotel and their airfare is being paid and
18 the commissions that they're earning are going to be paid, or
19 they're going to leave, right.

20 We deal with this all the time in Chapter 11
21 cases. The best people leave first, right. And the loyal
22 people leave second. And then everybody else is screwed,
23 quite simply, right. And we are trying our hardest to avoid
24 that.

25 We put on the table a whole company proposal, a

1 whole company proposal that needs to save this company
2 quickly. We didn't pick the sales process dates out of thin
3 air. We worked with the company very closely about when the
4 bid deadline would be appropriate and what time the auction
5 would be appropriate.

6 So and we've had conversations, some constructive,
7 some not so constructive with both Mr. Galardi and Mr. Martin
8 about whether or not there's a way to consensually move it.
9 Maybe there is, but where we are at the moment, Your Honor,
10 is a company in extremist. And we want that -- and that
11 company is our collateral.

12 So, we have hope on this side of the courtroom and
13 we have already sunk commitment on our side. We have a
14 secured facility, senior secured. We have a subordination
15 arrangement with Mr. Galardi's clients. We are worried that
16 our collateral is being destroyed every single day. It's
17 being used to fund these cases and we have a real concern
18 about getting this process underway.

19 Now Mr. Dressel talked about the importance of
20 there being a plan, as opposed to a 363 sale that the fact
21 that we are providing for the payment of administrative
22 expenses, priority expenses. It is easy to imagine this
23 company turns into a liquidation in the worst way and we
24 don't want that to happen because it's terrible for us. And
25 that's why we've stood up and we want this to work.

1 But, on the other hand, it is also very difficult
2 for us to stand here painted as the villains, right, as if
3 we're stealing, you know, Lindberg's baby. This isn't the
4 way it works.

5 We've lent this money; we have the right to be
6 repaid. And when we're talking about the credit bid process,
7 and I do appreciate Your Honor's conundrum that you're
8 pronouncing to us. The fact is the burden is not on us, it's
9 on them, right.

10 We have the documents. We're ready to give them
11 to Mr. Martin. We've sent them just this morning, a markup
12 of the protective order. I have a zip file with everything
13 he needs ready to go, as soon as we get out of here. And
14 that information is going to show a very standard market
15 arrangement.

16 And we were not on the board. We don't have any
17 insider status. We were an independent lender. Deerfield
18 specializes in investment in the healthcare and pharma space,
19 so they are sophisticated people who invest in these things,
20 but we don't have any kind of overhang with respect to
21 Melinta.

22 We came into this as third-parties looking for an
23 equity return and a return on our debt. So with all due
24 respect, Your Honor -- and we are representing two funds that
25 have substantial resources. And to the extent that we need

1 to sit down and figure out what will give Your Honor, we will
2 be happy to do that. And we'll, you know, do that with both
3 the debtors and the committee and Mr. Galardi.

4 But, you know, that's the way these things work.
5 And the fact is even if GSK was coming in and buying this,
6 they wouldn't buy it through GSK. They'd set up GSK, you
7 know, special, you know, entity and you would need a
8 guarantee from the parent in order to make that company
9 financially viable in your eyes.

10 THE COURT: Yes, you would.

11 MR. BROMLEY: So, we're not blind to any of these
12 things. We're ready to do it on a commercial basis. But we
13 do believe, right, that when we're talking about this that we
14 shouldn't be walking into the room with the presumption that
15 we've done something wrong. The only thing we did wrong is
16 invest money in a company that can't pay us back.

17 THE COURT: I think that's a fair comment. And I
18 don't hope my questions meant to suggest that Deerfield did
19 anything wrong.

20 My question is we're in, I think what anybody
21 would agree, is a compressed timeframe. And I have
22 objections with respect to the compressed timeframe, plus
23 some procedural stuff which we'll get to. But I'm actually
24 looking logistically too at what people are able to do in a
25 given timeframe.

1 And so, it does concern me when I hear that
2 bidders don't have everything one would expect to have,
3 although I have -- the testimony was there was -- you know,
4 there's a significant data room with information in it. And
5 when I look at the timeline that's been suggested with
6 respect, not only to bids but, quite frankly, sale
7 objections, which just doesn't work; a sale objection next
8 Wednesday to people who don't know -- I haven't even approved
9 these procedures. They don't know they have to object by
10 next Wednesday.

11 There's some logistical things that simply are
12 troubling to try to fit it all in in the timeframe that the
13 debtors have put in front of me. So that's what I'm looking
14 at. And part of it is just logistics and part of it is to
15 ensure that if there is another bidder that can come forward,
16 they have time to do it.

17 And then the other colloquy I had with Mr. Dressel
18 about are the procedures precluding the debtors from
19 considering bids that could be higher and better. Those are
20 the two bid concerns I have and then I have some questions
21 about some of the procedures. But those are the two big
22 questions that I'm grappling with.

23 MR. BROMLEY: So, Your Honor, if I can take them
24 in order, from a logistical perspective, I total understand
25 where you're coming from. And for that reason, we have been

1 in active conversations with an attempt to come to some sort
2 of agreement to push this out for a reasonable period of time
3 that can satisfy the two competing concerns which is that we
4 have a company that's potentially running away from us, and
5 we want to have the opportunity for competing bids to be out
6 there.

7 And those are competing concerns and they have to
8 be balanced. So, from my perspective, I think if we had the
9 opportunity to sit in a room, we can try to get over that and
10 get to the conclusion.

11 This is not, I'm not standing here before you,
12 Your Honor, and saying unless that objection deadline stands
13 for Wednesday of next week, Deerfield is withdrawing its
14 proposal, right. That's not what I'm saying.

15 On the second point -- so we're willing to have
16 that conversation. We truly are.

17 On the other point, Your Honor, about the idea of
18 whether or not there's a cram-up opportunity, right, there
19 are two issues that we're grappling with, right, and you will
20 be addressing the cash collateral order after this which is
21 we're funding this, right.

22 So, we don't have situations in DIP lender world
23 where DIP lenders say, you know what, here you go. Here's our
24 money. Run the case and figure out how to pay us back,
25 right. I mean what we have is the most draconian DIP orders

1 imaginable that everything has to be paid with fees x and
2 multipliers y, all in cash, all on the effective date or you
3 know it's all going down, right.

4 And we're balancing the fact that we are using our
5 cash when we consented to the issue, like we -- you know, Mr.
6 Dressel mentioned it, but it was very difficult to reach an
7 agreement with the debtors about how we were going to proceed
8 with a post-petition marketing period, right.

9 It would have been -- you know, we felt -- we were
10 not, you know, party to the bargaining period because once we
11 said we were willing to pay the stalking horse bidder, we
12 didn't hear anything about it, of course, about any potential
13 competing bids, but we negotiated about whether or not how
14 much time we'd be willing to give.

15 The company was going into default. We had every
16 right to stand on our rights as a secured lender, fully
17 secured and say either foreclose immediately or do a plan
18 immediately. And so, you know, this is one of those things
19 where I think, you know, we're not giving credit for the fact
20 that we agreed to take this and not say file immediately on
21 January 1 with a plan and a confirmation schedule, and fight
22 on exclusivity and make it all be done by the 28th.

23 We said, okay. You want this sale process to go
24 forward. We got to the point we're willing to do it. And
25 then we said, but we've got to have -- we got to be paid. We

1 got to be paid in full. And so, these are connected, right.
2 Our willingness to consent to the use of our cash collateral
3 is tied directly to the fact that the bidding procedures have
4 to say that we're going to get paid in full.

5 This isn't, you know, I actually think, you know
6 with all due respect to my colleagues and they're doing their
7 best to advocate for their positions, it's a folly to think
8 that we're going to be able to be crammed up. We can't be
9 crammed up with equity. There's no one out there who's shown
10 any interest in doing any of this.

11 And, you know, what we're being asked to do is
12 twofold: extend the timeframe where the company is at risk
13 and, therefore, our collateral is at risk and; we want you to
14 agree to be able to have a cram-up come at you. And the fact
15 of the matter is, is you know auctions are organic exercises.
16 If anyone shows up at the auction and says, you know, here's
17 the best I have, I expect the people are going to come to
18 you, but I don't want to be in a situation where the people
19 have any impression other than what we are entitled to, which
20 is to be paid in cash.

21 You know, we're talking about an industry where
22 these are frontpage news items that this is an international
23 health crisis that antibiotic manufacturers cannot survive
24 because the economics have failed, right. We're dealing with
25 a coronavirus outbreak in Asia and potentially here soon.

1 And what we have is an uneconomic model for the manufacturer,
2 an invention of antibiotics.

3 And it's in that environment that we're going to
4 take, you know, a flier that these two guys want to take. It
5 just doesn't make any sense, Your Honor. We're the ones with
6 the risk. And if this exercise goes on for too long and this
7 company fails, the issue is we're going to be facing a
8 substantial loss on our debt.

9 And what we've done is to try to be, you know try
10 to do the right things. Let's put this company up for a sale
11 process. Let's move it fast. If it's going to work, it's
12 going to work quickly. That's what Mr. Finger said. That's
13 what Mr. Milligan said. And then Mr. Finger said he was
14 hired in September or August. Well Mr. Milligan said that
15 the company has effectively been on the market since 2018.

16 THE COURT: I don't think there's any
17 misapprehension that Deerfield is not going to sit by while
18 it gets crammed up. I don't think there's any concern with
19 respect to that. And I think it's fair that any bidder that's
20 coming in knows that. They're in for a fight if, in fact,
21 they were to attempt to do that.

22 My question is should I enter an order that
23 prohibits, that prohibits that auction, however remote that
24 option might be. That's the concern. I'm making -- I have
25 no basis to have an opinion as to whether or not Deerfield

1 could be crammed up. I have no basis to know that.

2 MR. BROMLEY: Well, Your Honor, I mean I think
3 where we are is, you know, there's a fundamental piece of
4 consideration that we've put on the table, right, which is
5 playing itself out in front of Judge Sontchi right now in the
6 Borden case which is whether or not there's consensual cash
7 collateral.

8 That milk truck is in the ditch, right, and it
9 ain't coming out quick. If we said, as a result of what's
10 going on here we are no longer going to consent to our use of
11 cash collateral and force us to give it to you, then this
12 case would be in the ditch behind them.

13 THE COURT: It would turn into that, into
14 something people should consider, yeah.

15 UNIDENTIFIED SPEAKER: I'll be heard on that
16 later, Your Honor.

17 THE COURT: It's fair and I appreciate the balance
18 that you're making that the Deerfield is permitting use of
19 cash collateral. Cash collateral is being used under the
20 budget. I heard the testimony with respect to the negative
21 cash flows and the continued negative cash flows. Obviously,
22 the professional fees in the case don't help in that
23 perspective.

24 So, I think its fair point that you're making.
25 It's not lost on me.

1 MR. BROMLEY: So, Your Honor, look, I have, you
2 know, I'm sure I'm anticipating that there will not be
3 agreement with my comments from my colleagues on the right --
4 on my left, you're right. So, I'll sit down and reserve my
5 rights. But, you know, we obviously are concerned about the
6 company and we think rightly so. Thank you.

7 THE COURT: Thank you.

8 MR. MARTIN: Thank you, Your Honor.

9 THE COURT: Mr. Martin.

10 MR. MARTIN: Warren Martin on behalf of the
11 committee. Let me start with challenge period.

12 And, by the way, it is a pleasure to deal with Mr.
13 Bromley and we've had great conversations and we have worked
14 toward resolution of issues, and the same goes for the folks
15 at Skadden.

16 However, logistics, just to lay out exactly where
17 we are today, two weeks ago, right about now, right about
18 five o'clock, the committee was formed, and it retained
19 Porzio; it retained Morris James the following day, so
20 thirteen days ago, and it retained its financial advisors on
21 Thursday, so twelve days ago.

22 On Friday, which was the 17th, so eleven days ago
23 now, I delivered a document demand to Mr. Bromley. There was
24 a request that we sign a protective order. The debtors sent
25 us one. We signed it that night. I'm now eleven days later

1 and we're hearing today you will receive our package very
2 soon.

3 And I trust him and that's very nice but my
4 challenge period is sixty days from the formation of the
5 committee. I've lost two weeks. I've got forty-five days
6 left.

7 Logistics, time, process and money. And I
8 understand just like Mr. Bromley understands those variables.
9 I understand those variables.

10 And for a while, I was stuck on that, and by the
11 way under the cash collateral budget it's about a million
12 dollars a week, 1056 precisely and Mr. Milligan testified to
13 that earlier today and it has changed to 1.3, what that was
14 based on. But Mr. Milligan has told us that of that \$1.1
15 it's \$600,000 of professional fees and \$500,000 of operating
16 losses.

17 Deerfield and the debtor, together, chose this
18 forum. The vast majority, if you use the \$1.3 million dollar
19 number well then you have -- let me do the math -- what did I
20 say six hundred and five hundred, right. Then you have \$800
21 in professional fees per week and five hundred.

22 Prior to the petition date, I don't know what Mr.
23 Bromley's fees were, but I do know what the debtors are
24 because it's part of the disclosure. And Skadden's fees, at
25 least, were \$6 million in the year prior to the bankruptcy.

1 Restructuring costs for the first thirteen weeks are listed
2 at \$8 million, that's a total of fourteen right there of the
3 twenty-five that Mr. Milligan testified to was the cost of
4 this undertaking. And all of us of little value except for
5 you, Your Honor, like Mr. Bromley said.

6 By the way of that eight million budgeted for
7 professional fees in the first thirteen weeks, the committee
8 professionals get a whopping \$272,000 dollars and that, you
9 know, with all the effort, with all the time that's been put
10 in to put together this process and set it to music and
11 recognizing what it would cost. The committee gets \$272,000
12 over that period to look into this, fight for our rights, and
13 do the things that we need to do.

14 I think it's important to ask the question who is
15 Deerfield and who are they not. Deerfield is not a DIP
16 lender. There is no new money here. There is cash on hand
17 that the debtor is using. Deerfield is a prepetition lender,
18 as best we can tell when we go through their documents, a
19 secured party.

20 Deerfield is also a bidder that with a lot of
21 information I'm sure going right back to that \$160 million
22 dollar loan on January 5th, 2018, a lot of information and a
23 lot of due diligence. Mr. Bromley made it very clear,
24 though, in his discussion with Your Honor that this was not a
25 loan to own. Deerfield is a lender that wants to get paid.

1 One of our biggest fears is not that we don't get
2 another bidder, but that we don't get two other bidders
3 because a concern, as Your Honor might imagine, bidders don't
4 want to pay a dollar more than they have. We think there
5 could be very substantial value here, and I'll talk about
6 that a little bit more based on Mr. Milligan's testimony.

7 But the concern is one other bidder shows up and
8 says \$141 million and Deerfield says thank you very much.
9 And so, there is no value for unsecureds under that scenario
10 and there is no value for unsecureds whatsoever. It's a
11 cram-down plan, absolute priority rule, two classes. If
12 there is no other bidder, Deerfield takes all; unsecured
13 creditors get zero. That's the plan that they filed.

14 I have one mission, one mission alone is to
15 extract value for unsecured creditors who, by the way, total
16 \$188 million dollars -- \$33 million of trade, \$75 million of
17 Vatera, and somewhere around \$80 million of the medicine's
18 company, and some of that is contested. Not to mention a
19 make-whole premium that Deerfield has not agreed to waive of
20 --

21 THE COURT: Why should they?

22 MR. MARTIN: Okay. That's fine. Of thirty
23 million --

24 THE COURT: It's their claim.

25 MR. MARTIN: Well maybe it's for another day --

1 THE COURT: Yeah --

2 MR. MARTIN: -- and I hope that's a discussion.

3 THE COURT: Yeah, that's for another day.

4 MR. MARTIN: Yes.

5 THE COURT: Why should they waive a claim they
6 have?

7 MR. MARTIN: So, if I include that, we're at two
8 hundred and -- 218 million of unsecured debt that I stand
9 here for that has no value provided.

10 Let's talk about that cash loss, that million
11 dollars a week, most of which -- or million one -- most of
12 which goes to professional fees. It ends, under this process
13 that's been teed up with either Deerfield being paid full in
14 cash or Deerfield getting the company; those are the two
15 possible solutions, based on this process, if it's not
16 adjusted.

17 Mr. Milligan testified and there was cross that
18 explored the nature of that inventory, but there's \$80
19 million in book value inventory, 70 million of which, he
20 said, is salable for 10 years; primarily, active
21 pharmaceutical ingredients. There's 52 million in cash.
22 There's intellectual property that we don't have a value for
23 and there's 350 million of net-operating losses.

24 There were, as Mr. Milligan testified, offers not
25 even a year ago for the same four products, same business of

1 between 240 and 300 million, if I'm adding the 90 million
2 cash on hand for this company.

3 THE COURT: But we don't have that today.

4 MR. MARTIN: We don't have that today, but we
5 think there's substantial value and we need time to explore.

6 Let's talk about the timeline *vis-a-vis*, our
7 challenge period. So, our challenge period at 60 days would
8 expire on March 14th. If the schedule were pushed out 30
9 days -- I know we said 45 days in our papers -- but if the
10 schedule were pushed out 30 days, the challenge period and
11 the bid deadline would be coterminous and that would be a
12 sensible solution.

13 One moment, Your Honor.

14 (Pause)

15 MR. MARTIN: So, about the process and the timing.
16 We heard from Mr. Finger. No customer names have been
17 provided. It is interesting that Deerfield upset about that
18 and although I think them not being upset fits into what
19 Mr. Bromley posited to Your Honor, that they're a reluctant
20 owner; they didn't come here to own this, they came here as a
21 lender. They wanted to make a lot of money on the equity,
22 but they're a reluctant owner. So, they're going to buy
23 this. They're going to be there.

24 No customer names. No cure schedules. Not even a
25 list of executory contracts have been provided to lenders.

1 Deerfield has had full access to management; other
2 bidders have not. Mr. Finger was very clear that the only
3 discussions that happened were through him.

4 THE COURT: But that doesn't suggest they didn't
5 have full access; that just suggested that he was in the
6 room.

7 MR. MARTIN: Correct.

8 THE COURT: He had to be in the room. But there
9 was not testimony that I recall that a bidder asked for a
10 management meeting and didn't get it because Mr. Finger
11 couldn't be in the room.

12 MR. MARTIN: I'm not suggesting that, Your Honor.

13 THE COURT: Okay.

14 MR. MARTIN: I'm just suggesting that the access
15 levels are different when you have a secured lender who is
16 the bidder.

17 THE COURT: Well, that's always going to be the
18 case, isn't it?

19 MR. MARTIN: Yes.

20 THE COURT: Okay.

21 MR. MARTIN: So, we've been troubled about one of
22 the same things that Your Honor expressed concern about.
23 This is a little bit weird. We have an auction under this
24 procedure if we go forward with it, where one of the bids is
25 a plan, but it's a plan that isn't confirmed yet and, in

1 fact, who knows if it's confirmable, and we have the bidder
2 proposing that plan not agreeing to serve as the backup
3 bidder. So, the timing is, I would suggest, in reverse.

4 How do the other bidders know that they're not
5 bidding against a phantom? They're not a backup bidder and
6 the other bidders -- and none of us knows if that plan that
7 Deerfield is agreeing to take pursuant to, will be confirmed.
8 So, it creates a very strange process.

9 Mr. Dressel talked about exclusivity. I don't
10 think it's an exclusivity issue because the debtor opened the
11 door. The debtor created a process where a plan can be a
12 bid. And if a plan can be a bid, why does it have to be a
13 very specific plan that does nothing other than pay
14 Deerfield, at a base level, 140 million? Why can't it be 135
15 million and we're term out five or 120 and we'll term out 30?

16 There are many options if you comply with 1129 of
17 the Bankruptcy Code that Deerfield, potentially, could be
18 crammed up. And, yes, I don't hesitate for a moment to
19 understand that this would be a difficult and uphill process,
20 but, again, the committee with our -- at least as of right
21 now -- with our \$272,000, we have nothing for our
22 constituents.

23 THE COURT: Well, I can solve the \$272,000.

24 MR. MARTIN: Thank you, Your Honor.

25 You're going to hear later about -- much later --

1 but you're going to hear later about the KEIP from my
2 colleague, Ms. Parisi, and we understand and respect the
3 needs and interests of employees, but one of the things that
4 you heard from Mr. Bromley, particularly in his cross-
5 examination of the witnesses, is that, Well, you know, under
6 my bid, I'm not a pharmaceutical company, so I need
7 everybody, and under some of these other bidders, they might
8 just take the products and leave everybody else behind.
9 That's a concern of ours, too, because we need to incent
10 everybody -- everybody, not to just look in Deerfield's
11 direction, but to look to the direction of maximizing value
12 and getting that bid price up.

13 Most bid procedures orders have flexibility in
14 them in terms of what is a qualified bid. This one has no
15 flexibility. The only flexibility in there is that if
16 there's four product lines and we have four bidders and they
17 total 139 million, that's not a qualified bid. There's no
18 ability to make that a qualified bid. The only ability
19 that's given to the investment banker is to call the people
20 and try to get them up to a qualified bid.

21 But there's no ability to say, You know what? If
22 we've got four different people and four different product
23 lines and it totals 139, I bet if they're in the same room,
24 they're going to find a way to eclipse that 140.

25 THE COURT: I think that's a fair comment. It's

1 something I had a question about, which I would like to hear
2 a response to.

3 (Pause)

4 MR. MARTIN: Apologies, Your Honor. I'm just
5 looking over my notes. I'm trying to be responsive.

6 Do the procedures limit the ability to get
7 competing bids? -- that was one of the questions that Your
8 Honor raised.

9 Our financial advisors think that they do. Our
10 financial advisors --

11 THE COURT: Why wasn't he on the stand? I've got
12 evidence and it was the time to put somebody on the stand.
13 Why didn't I have somebody on the stand?

14 MR. MARTIN: That's fine, Your Honor. Strike
15 that.

16 I'm going to stop there.

17 THE COURT: Okay. Mr. Galardi?

18 MR. MARTIN: Just so Mr. Bromley falls out of his
19 chair, we did work with him and he did a very good job of
20 working with us and, unfortunately, we couldn't get to a
21 deal.

22 So, now, I'm coming from the left side -- Your
23 Honor usually sees me from the right -- I will say this.

24 THE COURT: Actually, I haven't seen you at all --

25 MR. GALARDI: At all --

1 THE COURT: -- from the bench.

2 MR. GALARDI: -- and you know, when I said to you
3 that, I didn't realize it would be six months later and I'd
4 be here in front of you, right?

5 THE COURT: Uh-huh.

6 MR. GALARDI: Good to see you, again, Your Honor.

7 First, let's take some of the testimony, because I
8 do think it goes to why a plan alternative is actually a real
9 alternative and we may never have to get there. The
10 testimony is there's no default under the Deerfield agreement
11 that gives you a reinstatement option. Second is, 1129
12 allows you to give cash-deferred payments over time to a
13 secured creditor.

14 So, whether you get -- and, again, it's just a
15 matter of what the fight could be -- but if -- look, if
16 you've got \$130 million and you're going to term out \$10
17 million over a certain period of time and my clients, his
18 clients, other clients get equity, I don't know how the
19 debtor can say in their fiduciary duty, that should be
20 foreclosed today. And that's what the debtors have done.
21 That should be an option.

22 And Your Honor doesn't have to decide that. As
23 we've proposed, and what we think is very -- it's just don't
24 preclude that, because if you send the signal it's precluded,
25 you won't get that kind of bid -- why are we even doing that?

1 If you say you can have plans -- plans will be
2 considered -- everybody knows Mr. Bromley has every ability
3 to argue that that's not confirmable. Mr. Bromley has --
4 and, again, we don't want a Borden milk truck in a ditch --
5 we don't want to have the cash collateral fight.

6 If we have to, we'll have it -- and maybe we have
7 to have it after today if he walks away -- but, again, Your
8 Honor goes back long enough with me to know the secured
9 bidder -- the secured creditor and the bidder or the
10 financier and the bidder has always been something that's
11 been in tension and we're in that tension here, and we're at
12 a bid to use the process -- and I know they don't want to do
13 UCC -- but to use the process, essentially, to get an order
14 to get NOLs that would not be available outside of
15 bankruptcy.

16 And so, if those are available to other bidders or
17 you can do a plan, then it is simply asking for a time to be
18 able to explore those, which, frankly, the debtor did not
19 explore. No testimony today says that they actually explored
20 that. All they've said is, Well, Vatera could have done
21 that, but they didn't say they went out and did it, and we
22 won't get to he said/she saids between lawyers, but we could.

23 So, I think the first issue you're asking is: Why
24 do you foreclose that?

25 If that's the case, I think the debtors are in

1 breach of their fiduciary obligations, because they have to
2 consider higher and better as a fiduciary. They have to
3 consider alternative plans.

4 Yes, they have exclusivity, and all they're really
5 doing is inviting a fight over -- and we had this
6 conversation with the committee -- we're going to terminate
7 exclusivity. Why have that fight? Why have those legal fees
8 right now?

9 Why not just let us be able to bring a bid, don't
10 foreclose it, and let people have a discussion. We've all
11 been to auctions, just like we've all been to hearings when
12 we go in conference rooms. Let's have a discussion about
13 whether or not we can get that bid.

14 Second point, I don't know if the bid today is now
15 142 or 140, but the fact of the matter is the explanation was
16 given over here that it was a reasonable break-up fee,
17 expense reimbursement. Counsel gets up, the brief gets up --
18 well, it's all allowed under the credit agreement.

19 Well, let's believe it's all allowed under the
20 credit agreement. Your Honor knows credit agreements as
21 well, if not better, than I do. There's a reasonableness
22 factor in those whether they say pay all fees, and it all has
23 to be with respect to the protection of the collateral, and
24 it doesn't necessarily mean you get to buy your assets and
25 get paid under your credit agreement. You get to protect

1 your collateral.

2 Now, if they want to argue I get to protect my
3 collateral with both, an adequate protection payment and I
4 get to protect my collateral by credit bidding and I get to
5 protect my collateral by a plan, I think there's an argument
6 that says they don't get all of those fees. We don't need to
7 have that argument now, but I don't know what the secured bid
8 is.

9 Is it 140? Is it 142? Is it going to be after
10 the adequate protection fight, 143? What's the number?

11 Why that's important to my client is, as
12 everybody's pointed out, we're subordinated, but once they're
13 paid in full, we're not, and so we'd like to know if we can
14 get that recovery. I agree with Your Honor, they don't have
15 to -- they shouldn't give up a make-whole claim -- that'll be
16 a litigation -- now, nobody's asking, but they've already put
17 that at unsecured; that's not going to get credit bid.

18 But the rest of the claims, we just don't know and
19 I don't know how a bidder knows. And now, it may not make a
20 difference of one or two or three million, but when we're
21 doing a plan, it's going to make a difference. What is it
22 that we're going to have to get deferred cash payments over
23 time?

24 And I think they should say, this is it. And I
25 don't think it's -- and let's say (indiscernible) to get it

1 as a secured claim, they've got to show the value of the
2 collateral is greater than the claim.

3 THE COURT: Uh-huh.

4 MR. GALARDI: What we've heard here is nobody
5 believes we're getting over that bid. Nobody is going get a
6 cash bid.

7 So, frankly, they're not entitled under their
8 document under the Bankruptcy Code to expense reimbursement
9 as a 506 -- under 506.

10 THE COURT: As a secured creditor.

11 MR. GALARDI: As a secured creditor.

12 So, they have to go over to 503(b), but I don't
13 know if it's necessary to preserve their collateral because
14 we're giving them adequate protection. You can't get it both
15 ways.

16 Next thing -- I understand that the
17 professionals -- and the last thing I want to do is throw
18 professionals under the bus -- but let's just take, what is
19 the meaning of a carve-out? A carve-out says that if at
20 the end of the day you don't get paid from somebody else's
21 assets, you surcharge their collateral.

22 THE COURT: Uh-huh.

23 MR. GALARDI: So, that's 600 a month that's being
24 deferred -- 600 a week -- sorry, I got corrected.

25 Their protection -- Skadden is very good at it,

1 used to do it all the time -- they've got a really good
2 carve-out; they're protected. So, let's not feel bad for the
3 professionals -- they're getting paid.

4 So, we really only have the five-hundred-a-week
5 cash burn. That's all that's really going out the door on a
6 loss, and, yes, I understand that's a burden on Deerfield,
7 that's a risk on Deerfield. So, I'm sympathetic to them
8 saying, Let's not go 45 days, let's not go 60 days. But if
9 the committee is willing to live with 30 and they get an
10 investigation period, we're certainly willing to live with
11 30, especially if we get the plan scenario in place.

12 What you've also heard -- and we've gotten the
13 threats -- but I guess the question is: Do they really want
14 to have -- given their own view that the value of the assets
15 is probably not greater than their own collateral -- do they
16 really want to have a cash collateral fight?

17 It doesn't have to show an equity cushion. I
18 don't know if there's an equity cushion. The committee may
19 think that there is, but we do know that the process is the
20 process that's going to maximize the value and you can get
21 adequate protection by maximizing the value.

22 And what we've heard here today is one of two
23 things. They are either going to foreclose on their assets
24 if nobody else comes in -- one of two things -- foreclose on
25 their assets; they will have gotten exactly what they

1 bargained for -- their assets.

2 Second, they'll get a (indiscernible) in the plan
3 and they're going to pick up assets. We may have a dispute,
4 we may not get to it today. At least the NOL created in 2019
5 at the end of the year is not their current property. It may
6 be protection -- adequate protection, but they're picking up
7 assets that nobody can tell me is allocated a purchase price.

8 So, they've got adequate protection. They've got
9 a deal and so --

10 THE COURT: Under Swedeland -- I mean, we're not
11 at the DIP, but under Swedeland, they really have adequate
12 protection with a possibility of a use of an NOL if --

13 MR. GALARDI: Okay. If that's not, then why do
14 they have to give it up? They are -- they're giving it up as
15 a general intangible.

16 Then don't give it up. I'm happy for you not to
17 approve that --

18 THE COURT: Don't give it up -- what do you mean?

19 MR. GALARDI: As adequate protection. Don't give
20 them an adequate protection in the NOLs.

21 I'm going to bet over on this side -- because we
22 looked at the issue -- general intangibles and after-acquired
23 property -- that's what an NOL is -- arguably, under 2008
24 they got it -- under 2018. 2019, generally, it doesn't come
25 into existence until the end of the year.

1 If they want to argue it's an after-acquired and
2 they get it under an adequate protection lien, that's fine.
3 If they want to say, No, that's not adequate protection, then
4 it's an unencumbered value that no unsecured creditor is
5 getting.

6 Now, I'm getting ahead for the NOL motion, but,
7 again, it's what's -- what are you giving them for adequate
8 protection here -- attorneys' fees? So, we'll wait for cash
9 collateral.

10 On the bid procedures, so our two -- our real
11 objection was simply, one, give us a plan; two, the expense
12 reimbursement is not really a -- if it's a reimbursement,
13 they haven't satisfied 503(b) and if it's as they're now
14 saying, a secured claim, they haven't shown that the value of
15 the collateral exceeds the value of the debt and, therefore,
16 they're not entitled to it under the bankruptcy law.

17 Now, if they want to bid it, then they're now
18 saying, Well, now, the security value is one forty-two.
19 That's not what their bid is.

20 Those are my comments, Your Honor. I don't know
21 if you have questions.

22 THE COURT: Not on that, thank you.

23 Ms. Richenderfer?

24 MS. RICHENDERFER: Thank you, Your Honor.

25 Good evening.

1 THE COURT: Good evening.

2 MS. RICHENDERFER: Linda Richenderfer from the
3 Office of the United States Trustee.

4 I just want to emphasize three points, because the
5 devil is in the details -- and this is what we went through
6 in the wage motion -- the devil is in the details: What are
7 the numbers? What are the caps?

8 Here, the devil is in the details. I was
9 surprised to found out just now that two weeks after the
10 committees formed, they still don't have the documents they
11 need to start their due diligence for the challenge period --

12 THE COURT: Uh-huh.

13 MS. RICHENDERFER: -- and that they have agreed to
14 a protective order, and now we heard Mr. Bromley saying he's
15 going to send them an NDA to sign.

16 We all know under our Local Rules that you can
17 produce information and it's attorneys' eyes only for a
18 certain period of time. You can't get your financial
19 advisors to sign on to whatever is necessary. There are all
20 kinds of other orders that could be entered regarding the
21 ability of committee members to see the information if that's
22 part of the concern, but none of that has been going on. I'm
23 just astonished to find out two weeks later, the committee
24 still has not had its requests met to start this process.

25 And I do apologize to Your Honor, I have -- I used

1 an incorrect date in my objection. I used 75 days after
2 formation of committee. I got the dates wrong.

3 THE COURT: Okay.

4 MS. RICHENDERFER: Sixty days, of course, after
5 formation of committee.

6 Data room -- we heard about how much information
7 is in there, how much information is in there.

8 In my prior life I did a lot of litigation and
9 that was the deal -- you just flooded the people with the
10 information. You produce boxes and boxes and boxes and CDs
11 and DVDs and everything else of information.

12 I don't know how under this time frame, a bidder
13 can come in and figure out who are the customers, what are
14 the essential executory contracts, what's the cure amounts,
15 if they have to go wading through this wealth of information
16 to figure it out. Again, under their own proposal, the
17 listing of the assumed contracts should have gone out by now.

18 THE COURT: Uh-huh.

19 MS. RICHENDERFER: Because one thing we haven't
20 discussed yet is the rights of the counterparties to those
21 contracts to speak up and to object to the cure amounts and
22 to raise issues regarding whether, you know, the adequate
23 protection or -- we haven't even discussed that -- and we're
24 totaling condensing the time period on that. They don't have
25 the notice. Bidders coming in don't know where to start.

1 And the last point that I don't think really has
2 been discussed yet is that -- and, again, I've only been
3 doing this for two years in the U.S. Trustee's Office -- but
4 I've yet to see a situation where a lender becomes a credit
5 bidder and they remain part of the consulting party group,
6 and I don't see how that can work in this situation.

7 THE COURT: I'd also like a response to that.

8 MS. RICHENDERFER: To me, that just jumped off the
9 page and I don't understand under what circumstances that
10 could possibly fly if we're going to have a clear, complete,
11 transparent process for this, and that was a detail that was
12 very important to me.

13 THE COURT: Yes, thank you.

14 Mr. Dressel?

15 MR. DRESSEL: Thank you, Your Honor.

16 Again, Christopher Dressel, on behalf of the
17 debtors. I'll try to be, you know, brief.

18 Your Honor, the debtors insisted on a post-
19 petition marketing process because we did not feel that the
20 well had run dry on potential -- not because we felt the
21 Deerfield bid was bad -- but because we felt there were
22 potential opportunities to do better than the Deerfield bid.

23 But we want to do that in a responsible way and I
24 think that means two things. One, we had a choice to make.
25 We could pursue a post-petition marketing process on a

1 consensual basis with Deerfield with consensual use of cash
2 collateral or we could go hostile to Deerfield. We could
3 look for, you know, shoot-for-the-moon approaches to try to
4 cram-down Deerfield or other hostile plans that Deerfield
5 wouldn't approve of and, therefore, wouldn't permit their use
6 of cash collateral to pursue.

7 Based on what we had seen in the prepetition
8 marketing process, we've seen interest from bidders, you
9 know, in the cash bid in a sale of the company and
10 potentially trying to get to levels that would equal or
11 exceed Deerfield. We also went out to the market for
12 potential financing sources. As Mr. Finger testified,
13 unfortunately, that turned out to be a dead end. We didn't
14 have parties coming forward to say that they wanted to
15 sponsor a plan to cram-down Deerfield.

16 And so, when we looked at our alternatives, we
17 decided that the clear, value-maximizing path was to pursue a
18 robust, post-petition marketing process that was subject to
19 some guardrails that were negotiated with Deerfield, but
20 which had the accompanying benefit of allowing us to use
21 Deerfield's collateral during the case, which is diminishing,
22 due to cash burn and other factors, to pursue a higher and
23 better bid.

24 We think that is a clear win for the estate, is
25 clearly consistent with the debtors' fiduciary duty to

1 maximize value. But even if you disagree, you know, Mr.
2 Galardi has his right to seek to terminate exclusivity if he
3 thinks there is a better plan out there that would cram up
4 Deerfield or whatever alternative he's envisioning; that's
5 his right, but that's not the debtors' perspective right now
6 and we want to pursue a plan that we think has the highest
7 likelihood of a successful outcome in this case and a lock-in
8 value for junior stakeholders and for the estate as a whole.

9 THE COURT: But those aren't mutually exclusive.

10 I understand the use of -- the consensual use of
11 cash collateral and I certainly think that Deerfield is
12 entitled to be protected, adequately protected. They are
13 entitled -- it's not my thought -- they are entitled to be
14 adequately protected for the diminution in the value of the
15 cash collateral that is used in the course of this bankruptcy
16 case and if the collateral, the non-cash collateral
17 diminishes in value, et cetera.

18 So, that places a pressure on a time frame -- I
19 understand that -- and we can talk about the time frame. But
20 given the compressed time frame, it surprises me, for
21 example, that the committee doesn't have their documents yet
22 to a review. It surprises me that I've got no list of cure
23 amounts, executory contracts, customers.

24 Given the compressed time frame, that stuff needed
25 to be available so parties would have it and this time frame

1 of the -- set forth in the order about deadlines, et cetera,
2 just not only crams up the Court, it crams up
3 counterparties -- I shouldn't use that word -- it
4 disadvantages others that aren't in this room to be able to
5 participate with respect to their contracts, with respect to
6 their rights because of this contracted time frame. So, that
7 concerns me.

8 Even if you have a contracted time frame that's
9 mandated by a reasonable use of cash collateral and a
10 reasonable requests for adequate protection -- and some of
11 their requests, I think, are reasonable -- it's the
12 preclusion of the possibility of opportunities for someone
13 else to bid that would be higher or best on any basis.

14 I don't think I've ever approved bid procedures
15 that are this restrictive on what could be a qualified bid
16 and that concerns me. Even in the context of this case, if
17 we try to limit it, it starts to chip away at the idea of
18 what is a possible bid.

19 In fact, one of the first contested -- major
20 contested hearings I had as a judge, someone came in and
21 said, Your bid protections didn't permit this type of bid.
22 That was exactly the fight I had. We had a fight over what
23 the bid protections permitted. So, that has been an issue
24 that I'm attuned to as a judge because it was an attempt to
25 preclude a higher bid.

1 And these are restrictive into the type of bid
2 someone can put, and I think that is divorced from the time
3 frame, understanding that if you need a time frame to do a
4 different type of bid, but I think that is somewhat divorced
5 from the time frame, is the type of bid.

6 MR. DRESSEL: Yeah. Understood, Your Honor.

7 Maybe -- so, two responses on the type of bid and
8 then I would like to address the time frame. So, you know,
9 first of all, I actually don't think it's uncommon for bid
10 procedures to require that competing bidders match the
11 stalking horse bid in cash.

12 More fundamentally, though, Your Honor, I think
13 the important point is that the debtor didn't have sort of an
14 infinite variety of process alternatives it could choose
15 from. We didn't have the opportunity to put in place any
16 permutation of process that we wanted. Really, we had to
17 choose between three options, really: (A), we could have
18 just gone with the Deerfield bid because --

19 THE COURT: You could have and then we have a
20 fight over it at confirmation time.

21 MR. DRESSEL: That's one alternative, and we
22 didn't choose that because we didn't think it was value-
23 maximizing. The second alternative was to run a post-
24 petition marketing process on terms that were highly
25 negotiated with Deerfield, but at the end of the day, were

1 acceptable to Deerfield and which Deerfield permitted the
2 debtors to follow and to use its cash collateral to pursue.
3 So, that's option two. And the third option is that we could
4 have pursued a path that was hostile to Deerfield, that
5 sought to cram up Deerfield or impose some other treatment
6 that was unacceptable to Deerfield.

7 And those were the three discrete options that we
8 looked at. When we reconsidered those options, I think it
9 was clear to us that certainly the third option was not a
10 value-maximizing alternative.

11 Again, if unsecured creditors really think that
12 that's the way to go in this case, they have the right to
13 seek to terminate exclusivity and pursue it, but we would
14 submit that that is not only not value-maximizing but is
15 actively value-destructive in this case. It's likely to
16 highly destabilize the business and I don't think that it's
17 going to lead to the result that unsecured creditors want.

18 And that brings me -- I think that's a good segue
19 to my comments on the process time frame. I think, first of
20 all, Your Honor, we have 45 days of post-petition marketing;
21 that's on top of three months of formal prepetition
22 marketing, which, in turn, was preceded by kind of a less-
23 formal period of time in which the company was on the market.

24 We reached out to 77 parties prepetition. The
25 bidders that are active in the process to date are still in

1 the data room -- have been in the data room for a long time.
2 They've been doing their diligence. They haven't just
3 started, you know in the process. In some cases, as I think
4 Mr. Milligan testified in his declaration, we've had bidders
5 who have been active in the data room for something in the
6 order of nine months. So, there's been an extensive
7 diligence effort.

8 I know the committee made a lot about two specific
9 items that remain outstanding -- the customer list, the
10 contract list. On the contract tier schedule, we absolutely
11 get it; we know that's a priority and it's a priority for the
12 company to complete imminently.

13 On the customer list, that's one request from one
14 party. It raises particular sensitivities from antitrust
15 perspective. We're working through that issue as
16 expeditiously as we possibly can, but there's a lot of
17 thought that needs to go into how to respond to a request
18 like that in a manner that's not only expeditious, but --

19 THE COURT: So, you need some time to be able to
20 respond to it?

21 MR. DRESSEL: We're actually very close to
22 responding to it, Your Honor.

23 But the point is, I think, as Mr. Milligan said,
24 we've had something like 900 data requests. We've responded
25 to the vast majority of them in a prompt manner.

1 THE COURT: Uh-huh.

2 MR. DRESSEL: It's not, you know, civil litigation
3 discovery where we just do a data dump; these are thoughtful
4 responses to specific questions that the management team
5 devotes extraordinary resources to tackling. So, we think,
6 you know, in terms of the length of the process prior to
7 today, it's been extensive and it's been long.

8 I understand that there's some particular concerns
9 about the dates and I think -- and I'm not saying that we
10 have no flexibility to discuss how we can logistically deal
11 with some of the procedural dates that may not work in --
12 from your perspective -- in the revised order that we
13 prepared and submitted a redline on. We made an effort to
14 try to address some of the dates that don't quite work.

15 THE COURT: Uh-huh.

16 MR. DRESSEL: What I would say, though, Your
17 Honor, is that really what you're talking about in that
18 regard is something that's more in the matter of days and
19 certainly isn't in the 30-day time frame that the
20 committee --

21 THE COURT: It may not be.

22 MR. DRESSEL: -- is requesting.

23 From our perspective -- and I think the testimony
24 of Mr. Milligan -- is that an extension of this process in
25 the -- of the magnitude of 30 days would be costly to the

1 business, potentially destabilizing. As Mr. Finger said,
2 it's not likely to result in higher and better bids; if
3 anything, it's likely to suppress bidding further because
4 bidders will look at the climb in cash balances and other
5 circumstances relating to the business. And from that
6 perspective, Your Honor, we would submit that a timeline, as
7 roughly in the order of that proposed, is the value-
8 maximizing alternative here.

9 I think there were two specific points that Your
10 Honor wanted a response on. One is how we're dealing with
11 combined bids.

12 THE COURT: Uh-huh.

13 MR. DRESSEL: On that, again, Your Honor, the
14 bidding procedures -- although they've been characterized as
15 being extremely rigid -- they actually give the debtor
16 flexibility to consider alternative bids. But just as a
17 solitary bid for the whole company would be required to
18 overbid the amount of the stalking horse bid, so, too, we've
19 said that any combination of bids taken together must yield
20 cash consideration sufficient to overbid the amount of the
21 stalking horse bid.

22 We think that is very reasonable; in fact, we
23 think if we gave the other message to bidders, that would
24 actually be likely to induce them to bid at a lower amount
25 because they might perceive that they could get into the

1 auction without necessarily putting their best foot forward.
2 So, our perspective is that the way we guide bidders is just
3 to tell them to put their best foot forward, ascribe the most
4 value that they can internally justify for the asset that
5 they're bidding on and then we will do our best at auction to
6 pair up complimentary bids in order to create a sort of
7 combined bid that qualifies for the auction and exceeds the
8 value of the stalking horse bid.

9 THE COURT: Is that -- okay, so, is that your
10 procedure? Is that people come in with whatever bid, they're
11 allowed to come to the auction, and either you or they,
12 perhaps, can talk to each other and come up with a bigger
13 bid?

14 MR. DRESSEL: I don't think it necessarily
15 requires active coordination among the bidders. I think to
16 put in more concrete terms, this company has four
17 pharmaceutical, you know, products. For one of the products
18 we've seen some standalone interest. We've also seen
19 interest in the other three products taken collectively.

20 And so, if on a bid deadline we see one party
21 bidding for the three products -- which we call the
22 "hospital-only products" -- we see another party bidding for
23 the remaining drug -- which we refer to as "Baxdela" -- we
24 would look at the value ascribed by the respective bidders to
25 the assets that they're bidding for, we'd sum those totals

1 together, and we'd see whether the combined total of those
2 bids equals or surpasses the value of the stalking horse.

3 If that's the case, then we would admit both of
4 those bidders into the auction and they'd have an opportunity
5 to continue bidding on the respective asset for which they
6 had, you know, placed a bid. But it would not require -- it
7 would not impose on those bidders the additional burden of
8 coordinating with one another.

9 THE COURT: Okay. So, what if they're
10 collectively \$3 million below? What if they're collectively
11 one thirty-seven, you won't let them in the door?

12 MR. DRESSEL: I think at some point you have to
13 draw a line. It would be the same thing with a single bidder
14 that came up just shy of the --

15 THE COURT: I've never seen an auction that way.
16 I've seen auctions where people just come in with whatever
17 and then you auction it off in lots and you do all that first
18 and then you auction the company as a whole and then you take
19 a look and see what you've got. And sometimes the debtor
20 coordinates and picks and sometimes the people in the room --
21 the debtors says, Sure, go talk -- and the people in the room
22 come up with a better bid.

23 MR. DRESSEL: We're trying to allow bids for less
24 than all the assets to compete against the bid for the whole
25 company, but we have to do it in an orderly way. If we let

1 people bid --

2 THE COURT: Whatever they want.

3 That's -- I've got a lot of professionals in this
4 room whose job it will be at the auction to figure out apples
5 and oranges and decide.

6 Why are we pre-deciding the issue? You can't
7 decide that if they're \$3 million less, they're 10 million --
8 what if somebody comes in at 50 million?

9 I don't know -- maybe that wouldn't be -- but
10 we're drawing arbitrary lines on what the debtor says is an
11 open process, except it's not in a lot of different
12 circumstances.

13 MR. DRESSEL: I don't think the line drawn by the
14 stalking horse bid value was an arbitrary line. I think to
15 have a competitive auction, we have to know that the bidders
16 are willing to bid at a level above the stalking horse;
17 otherwise, there's really no value to the auction because the
18 stalking horse -- we'd open the auction and declare the
19 stalking horse the winner.

20 THE COURT: There you go. So, open the auction --
21 and you have everyone else's bids and nobody increases their
22 bids -- and you close the auction.

23 What am I missing?

24 MR. DRESSEL: That process is preordained if the
25 bidder hasn't bid at a level equal to the stalking horse.

1 THE COURT: Where you have multiple bidders, it's
2 different. Where you have multiple bidders, there could be
3 combinations, you could put them together, you can -- I guess
4 I'm missing it, especially since you're telling me you have
5 interests in one asset or one of the debtors' drug lines and
6 then you have interest in the other three. So, that even
7 tells me that you -- that there may be some combination that
8 could happen here.

9 MR. DRESSEL: Right now, we don't know the level
10 of that interest --

11 THE COURT: That's correct.

12 MR. DRESSEL: -- and there's a critical question.
13 If the level of the interest comes in on an aggregate basis
14 and it exceeds the value of the stalking horse bid, then,
15 absolutely, we want to facilitate those bidders'
16 participation at the auction.

17 If the aggregate level of those bids is less than
18 the value of the stalking horse, then at that point, by
19 definition, the stalking horse is the highest-and-best bid
20 for the company's assets --

21 THE COURT: By the debtors' definition -- by the
22 debtors' definition, but you haven't explored whether you
23 could create synergies among the companies where that would
24 work.

25 I'm not seeing a downside, quite frankly, to the

1 debtor or to Deerfield -- maybe I'm wrong -- I'm not seeing
2 the downside to permitting legitimate people, legitimate
3 bidders who show their financials, that they can perform on
4 whatever bid their making -- legitimate people in the room,
5 not people who you look at and say, Well, yeah, they're, you
6 know, they're pie-in-the-sky -- legitimate people in the
7 room.

8 MR. DRESSEL: Your Honor, we hear the point. I
9 think it might make sense for us to consult briefly with the
10 secured lender on that.

11 THE COURT: We'll have some time for that.

12 MR. DRESSEL: I think the other point that Your
13 Honor specifically asked about was consultation parties.

14 THE COURT: Yes.

15 MR. DRESSEL: We have indicated that Deerfield is
16 a consultation party, subject to the significant *proviso* that
17 the debtor, in its discretion, may choose not to consult with
18 Deerfield on any issue in which it determines that it would
19 chill bidding.

20 I think as a practical --

21 THE COURT: How does that not chill bidding right
22 off the bat --

23 MR. DRESSEL: I think that --

24 THE COURT: -- if I'm coming in as a third party
25 and I know that unless the debtor decides, in whatever

1 discretion it has, that another bidder gets to decide and
2 make decisions along the way, how is that not chilling? Why
3 would I even come into that bid auction?

4 MR. DRESSEL: Your Honor, I think -- again, I
5 think it's another point that we should visit with the
6 secured lenders and I think as a practical matter, given the
7 *proviso* we have, really, the only points on which we would
8 want to consult with Deerfield, given their status as a
9 bidder, would be things like scheduling and, you know, if the
10 date of the auction had to be pushed by a day or logistical
11 matters like that. So, I think on that one we would like to
12 consult, as well.

13 THE COURT: I will tell you I have never -- and I
14 have never approved a credit bidder being a consultation
15 party once they have made their bid.

16 MR. DRESSEL: Understood.

17 THE COURT: Okay.

18 MR. DRESSEL: So, those are my remarks, unless
19 Your Honor has any questions.

20 THE COURT: Let me ask another question -- and
21 that's the backup bid question -- so, Deerfield doesn't want
22 to be a backup bidder, somebody else comes along, everybody
23 else -- every other bidder has to be a backup bidder and
24 everybody else has to leave their bid open for a period of
25 time.

1 So, explain to me two things: why Deerfield
2 shouldn't have to, other than, this is what we negotiated
3 and, two, what that means with respect to the floor.

4 MR. DRESSEL: So, Your Honor, again, this was --
5 it was a negotiated point. I think when we look at what is
6 market for this situation, I think the stalking horse
7 bidder -- particularly a credit bidder -- you know, typically
8 insists on not serving as a backup; I think that provision
9 frequently prevails in this district, as well as in others.

10 And so, when we looked at points where we felt
11 that we could profitably negotiate with Deerfield, we thought
12 this was a kind of market, middle-of-the-road ask from
13 Deerfield's, you know, perspective. I don't -- I think the
14 issue of -- How does that affect the floor? -- I think those
15 are unrelated.

16 We're looking at the bid as it exists today. They
17 are subject to a definitive, binding restructuring support
18 agreement with the debtor, and so we -- whether or not
19 they're serving as a backup, I don't think, affects the floor
20 value of their bid.

21 THE COURT: Okay. The bid procedures at several
22 places reference the restructuring support agreement and they
23 say, "Except as otherwise provided in the restructuring
24 support agreement."

25 I'd like to know what's in the restructuring

1 support agreement that differs from what's in the bid
2 procedures.

3 MR. DRESSEL: May I ask if Your Honor is looking
4 at a particular place?

5 THE COURT: Well, I know I see it in -- on Page 17
6 at romanette (ix), but that's not the only place.

7 MR. DRESSEL: I actually don't see that particular
8 one, Your Honor, but just to take an example that jumps off
9 the page at me, in the reservation of rights, for example, we
10 say:

11 Except as otherwise provided in the restructuring
12 support agreement, these bidding procedures or the bidding
13 procedures order, we have -- we reserve various rights to,
14 you know, perhaps modify or ameliorate the provisions of the
15 bidding procedures.

16 And to go back, for example, to the backup bidder,
17 the provision in the RSA provides they're not required to be
18 a backup bidder, and so we couldn't modify terms like that.
19 So, I think that would be one example.

20 And I think it goes to the overarching point that
21 this is a process that they're agreeing to facilitate,
22 they're agreeing to be subject to overbids, and so in
23 exchange for that, the guardrails for the process are
24 consistent with those that we negotiated with them and,
25 again, negotiated intensely with them to get the best deal

1 possible we could.

2 THE COURT: Okay. I don't have any more
3 questions.

4 MR. DRESSEL: Thank you, Your Honor.

5 THE COURT: Mr. Bromley?

6 MR. BROMLEY: Your Honor, if I may address several
7 of the comments, I think Mr. Dressel was glancing in my
8 direction at several points, and so let me try to clarify a
9 few things.

10 As to the consultation party point, we had tried
11 to convey the message before Mr. Dressel got up, that that
12 was fine, that we would be removed, but the message hadn't
13 gotten fully delivered.

14 THE COURT: Okay.

15 MR. BROMLEY: Message now delivered, okay.

16 THE COURT: Thank you.

17 MR. BROMLEY: With respect to this construct of
18 considering group bids, right, I actually think that what
19 we've got here, Your Honor, is already a set of statements
20 that make it clear the debtor has -- particularly now that
21 we've clarified that we are not one of the consultation
22 parties for purposes of examining any of these bids --
23 adequate leeway to deal with this, right.

24 So, Section 4, Sub A --

25 THE COURT: Uh-huh.

1 MR. BROMLEY: -- right, what we have is an express
2 statement that says partial bids, right. It says that the
3 combined transaction exceeds the value of the supporting
4 lender transaction and why either such partial bids either
5 close simultaneously or -- and gives guidance, right, with
6 respect to the reasonable considerations that should be taken
7 into account when considering partial bids, right.

8 If you then look at what is in Paragraph IX, it's
9 the last page -- the last full page of text, the reservation
10 of rights -- it says very clearly that the debtors reserve
11 the right as they may reasonably determine to be in the best
12 interests of their estates in the exercise of their fiduciary
13 duties to: (A) determine which bidders are qualified
14 bidders; which bids are qualified bids; determine which
15 qualified bid is the highest or otherwise best -- it goes on
16 for, you know, (A) through (G).

17 There are lots of rights that the debtors
18 specifically negotiated with us to be contained within this
19 Paragraph 9, right. If Your Honor's question is limited to
20 the point of whether or not the combined bids at the moment
21 of the qualification of the qualified bid, right, all those
22 combined bids together --

23 THE COURT: Uh-huh.

24 MR. BROMLEY: -- constitute a qualified bid is
25 somehow prohibited by the exact language of 4(a), I think

1 that there's certainly leeway to talk about the timing of the
2 determination of the qualified bid between the submission of
3 the bids and the opening of the auction.

4 Because what we're talking about, Your Honor, is a
5 passage of time -- maybe we build in another day, in which
6 case the debtors have the right with their consultation
7 parties to sit down and determine whether or not exactly what
8 Your Honor has posited is something that's possible. I think
9 we're talking about a wordsmithing exercise. The whole idea
10 behind permitting partial bids is, as Your Honor said, to
11 allow them to be cobbled together to make the individual
12 determination -- the individual bids greater than --
13 together, greater than they are individually.

14 That being said, there are competing issues and
15 those competing issues are that prior to the bid-submission
16 deadline, you don't want to chill bidding by going out and
17 saying, Hey, Tom, do you want to hook up with Mary, in terms
18 of putting a bid in, because they both might be willing to
19 put in separate bids that are higher, right?

20 THE COURT: Agreed.

21 MR. BROMLEY: So, that's what bidding procedures
22 are generally trying to balance. I think the issue is
23 building in some cushion between the submission -- the bid
24 deadline and the determination of when the qualified bid is
25 made because we shouldn't be having a useless exercise with

1 respect to an auction, but all of the things that Your Honor
2 is concerned about happening can certainly happen between the
3 time the bids are submitted and between the time -- at that
4 time, and the time in which the debtors and their, you know,
5 consultation parties determine whether or not there's a
6 qualified bid.

7 When you look at Paragraph IX, you know, we
8 have -- it's not a full fiduciary out, right; there's certain
9 limitations. And I think, actually, the opening *proviso* is
10 subsumed within the parentheticals, right, you know, the
11 parentheticals that say, Other than the supporting lenders,
12 you know, in (E), impose additional terms with respect to all
13 potential bidders, other than the supporting lenders; extend
14 the deadlines with the approval of the supporting lenders.

15 That's -- those are the type -- those are the
16 things that are built into the RSA. So, I think this is a
17 lawyer's belt-and-suspenders exercise in which, you know, the
18 existence of the belt obscures the fact that we have the
19 suspenders. So, we could work on revising that language so
20 that exactly what's in the RSA is communicated clearly to the
21 potential bidders.

22 Your Honor, with respect to the backup bidder, I
23 think this is, you know, really a red herring for the
24 following reason. We are the senior secured lender. We have
25 liens on all of the assets. If everything falls apart, we

1 get it.

2 What we don't want to have happen is we've put
3 together a very specific plan-driven exercise and that plan-
4 driven exercise is tied very closely to making sure that the
5 company gets out on time and operates in an environment and
6 in a timeline that fits with all of the things that can be
7 delivered. This isn't a 363 sale; this is a potentially,
8 substantially deteriorating business.

9 And what the debtors have negotiated is for a
10 period of up to 60 days after the auction is -- or after the
11 sale hearing where we are supporting the business with our
12 cash collateral that those bids -- one or multiple ones --
13 all fail and we could be facing a very substantially
14 different -- a substantially different world at the end of
15 that 60-day period where our plan doesn't work. That we
16 wouldn't be able to satisfy conditions of feasibility.

17 We are in a situation, however, where we really
18 are the backup owner, because if all of it falls apart, as
19 the senior secured lender and the holder of liens and claims
20 and all the assets of the business, it will fall into our
21 pocket very unhappily in that circumstance. I think that's
22 the reason, as Mr. Dressel said, that in virtually every -- I
23 don't know of any situation where a credit bid has been made
24 where the backup -- where the credit bidder is the backup
25 bidder because you are, effectively, the backup bidder;

1 you're the recipient of the assets in a worst-case scenario.

2 But we've specifically put together a clear plan
3 process that anticipates this business will be an operating
4 entity --

5 THE COURT: I think that's a fair point. I think
6 it's a fair point that it's being done through a plan and
7 that circumstance may change where administrative claims may
8 be greater than you anticipated and that --

9 MR. BROMLEY: Or the --

10 THE COURT: -- it's a different scenario.

11 MR. BROMLEY: Or, you know, we could have a
12 strategic bidder come in and say, You know what? I don't
13 need any of the --

14 THE COURT: Yes.

15 MR. BROMLEY: -- salespeople and then they walk
16 away in 35 or 45 days and we have no salespeople.

17 We can't be forced to close on those
18 circumstances.

19 THE COURT: I think that's a fair point --
20 although, I do have a credit bidder on another case who's a
21 backup bidder -- but, yes, I think that's a fair point,
22 because this bid is through a plan.

23 MR. BROMLEY: So, if Your Honor has any other
24 questions, I'm happy to try to address them, but those are my
25 attempt to try to clarify.

1 THE COURT: Thank you.

2 MR. BROMLEY: Thank you.

3 MR. MARTIN: I just want to address that
4 particular issue --

5 THE COURT: Uh-huh.

6 MR. MARTIN: -- since it's fresh in our minds.

7 So, one of the things that we're all relying on if
8 this procedure goes forward as proposed is that Deerfield is
9 bidding the full amount of its claim, the full amount of its
10 secured claim and that if that hundred-and-forty-million-
11 dollar number -- and there's some calculations about exactly
12 what it is -- but if that's it, Deerfield is paid in full.

13 And the point I raised before, Your Honor, is it's
14 a little weird because the bid is pursuant to a plan, okay.
15 So, Your Honor raised some concepts that are perhaps fair --
16 administrative claims are way higher, the employees runaway,
17 et cetera -- what if Your Honor decides that a release in
18 favor of Deerfield under the plan or some provision, you
19 know, you're not going to approve and Deerfield decides to
20 pick up their marbles and go home?

21 Well, now, the value tanks. Deerfield -- they're
22 the secured lender -- we haven't done a cash collateral
23 yet -- but I need a lot of adequate protection, I need to
24 suck up all the assets. And here we are, this side of the
25 room, with no value when we could have had another bidder --

1 we could have had another bidder with a cash price that would
2 have taken them out in a different way.

3 So, it seems to me you either have to be in or
4 you're out.

5 THE COURT: It's different when you're in a plan.
6 I mean, you're asking for more time and the company is
7 deteriorating. That's a different scenario than somebody
8 coming in -- we're closing this within, you know, to all-cash
9 purchasers and we're closing it within a certain period of
10 time.

11 MR. MARTIN: But it's not a plan, right; it's a
12 bid.

13 THE COURT: It's a bid through a plan.

14 MR. MARTIN: It's a bid that I'm going to go
15 confirm a plan later.

16 THE COURT: It's a bid through a plan.

17 MR. MARTIN: And they will beat other people,
18 potentially, because they have some currency above the 140
19 million in credit. So, other people could be bidding cash
20 and they'll bid up -- Oh, I'm overcollateralized now, my fees
21 and expenses are covered, I'm going to bid that up. They
22 will have additional currency.

23 And we could wind up with a successful Deerfield,
24 when other people with cash that would have taken them out on
25 their secured claim, being left at the table and then the

1 plan doesn't get confirmed.

2 THE COURT: Well, maybe then you can make an
3 argument that Deerfield's bid isn't the higher and best bid
4 because of the risk.

5 MR. MARTIN: Fair point.

6 THE COURT: Maybe you have that argument.

7 Okay. It's 6:15.

8 Mr. Bromley offered on several occasions to talk
9 about certain aspects. I'm going to let you all talk. I
10 think you've heard my concerns, but I'll try to say them
11 again so as you're talking, you have them.

12 I'm concerned about the time constraints in the
13 process for the number of reasons that we talked about,
14 including that those not in this room who have counter-
15 contract rights under this scenario -- and I haven't seen the
16 markup -- don't have enough time to be involved and to
17 protect their rights.

18 And I'm not sure that there is time within a
19 February 20, it looks like -- I don't think I had you on my
20 calendar for February 20, but a February 20 sale date -- I'm
21 not sure there's enough time for parties not in this room to
22 protect their rights and to ensure that those bidders who do
23 not yet have executory contract lists, customer lists, have
24 them.

25 But I am cognizant, and the testimony was, that

1 this debtor is a -- is losing cash, even if it's only 500,000
2 and not a million one or a million three, they're losing cash
3 on a weekly basis. That cash, at least at the moment, has
4 been represented to us by the debtor is Deerfield's cash
5 collateral, subject to challenge, but that's what we have
6 right now, and they're entitled to adequate protection so
7 that their position is not diminished.

8 So, I think there needs to be some additional
9 time -- not 45 days, and I don't know that it's 30 -- I think
10 the parties need to talk, cognizant of the fact that
11 operationally, the company is losing money, as well as the
12 professional fees.

13 I think the process needs to be opened up so that
14 all types of bids can be considered. If there's going to be
15 a restraint -- if the debtor is going to come back and say
16 that there still needs to be a restraint on a particular type
17 of bid, I need a better explanation than what I'm getting.

18 I don't see a direct line -- I'm not making any
19 final determination in what I'm saying here -- but I don't
20 see a direct line between the use of cash collateral and not
21 being able to be taken out, crammed up, depending on what it
22 is. And the risk factors of closing, the risk factors of
23 getting to a plan, the risk factor of not being able to
24 confirm a plan, that all gets factored into, perhaps, what's
25 a highest and best -- and those are real factors -- but I

1 think to canvas the market, we need to permit whatever bids
2 come in, in whatever form. At the moment, I'm convinced by
3 Mr. Bromley, with respect to the backup bid argument.

4 Okay. We need to figure out when you can come
5 back and I'd like the parties to talk in the meantime about
6 the other motions, particularly, I'm thinking about the cash
7 collateral and the KEIP. And I won't say that the objections
8 were kind of "throw it against the wall and see what sticks,"
9 but there were some arguments, which weren't as persuasive as
10 other concerns -- let's put it that way.

11 I think I've said it's Deerfield's cash
12 collateral. I have to give them adequate protection.
13 There's not an option not to give them adequate protection.

14 I've provided some thought about cash collateral
15 in a ruling that I made in iPic I want to say.

16 Was that your case, Mr. Landis -- no -- was it
17 iPic?

18 MR. LANDIS: (Indiscernible.)

19 THE COURT: I'm going to write down what case it
20 was in. I think it was iPic, the theater chain. Mr. Dean
21 from Cole Schotz argued for the committee. And in that case
22 I gave -- I went back to basics -- I went back to the Ames
23 case, I went back to the Swedeland case -- what are we
24 looking at?

25 Swedeland is a really interesting read. It talks

1 about additional assets, additional liens on additional
2 assets that a lender does not have prepetition, okay.

3 I looked at Ames, which talks about it's not just
4 a business judgment standard. The Court has to exercise its
5 authority to approve the request. My discretion is not
6 unbounded, okay, but there are factors that we look at, such
7 as the attempts, as were testified to here, to get other
8 financing.

9 But the debtor does have fiduciary duties and we
10 look at whether the terms of cash collateral improperly
11 leverage the bankruptcy process, empowers, or if its purpose
12 is not so much to benefit the estate, as to benefit a party
13 in interest.

14 I'm not making a judgment here about whether this
15 one is or isn't; I'm just saying, going back to basics,
16 thinking about what has to be done, and I think there are
17 objections to adequate protection that don't fully appreciate
18 that there's not an option not to give cash collateral and it
19 can't be or protect -- adequate protection that can't be too
20 speculative. And on the other hand, the terms of the cash
21 collateral usage can't be too onerous, either. I will say
22 that.

23 And with respect to the KEIP, again, take a look
24 at it. I was a little surprised to see the objection that
25 it's not incentivizing. It's directly tied to recoveries or

1 it's, I should say, increased value. Does it mean maybe
2 aspects of it aren't? And I'd like to understand how the
3 prepetition retention payments mesh with the KEIP. I ruled
4 on a KEIP recently in Bumble Bee and provided thoughts there.

5 Unfortunately, for all of you, these are
6 transcripts, but -- and they're both recent -- so I think it
7 would be really helpful to focus on where there's a clear
8 issue -- and I think there are -- but let's stay away to the
9 extent we can, from a scattershot approach and focus me on
10 where there's a real issue and we'll get through things
11 faster, I think.

12 Let me ask this: If terms of the DIP and the
13 KEIP, we have more witnesses, I'm assuming? I've got
14 declarations, I know.

15 MR. MEISLER: Your Honor, in fact, one of our
16 witnesses for the KEIP, who's the chairman of the board, I
17 think is -- yep, he's still with us. If there could be some
18 way where we could get him in tonight --

19 THE COURT: I'm thinking yes.

20 MR. MEISLER: -- that would be --

21 THE COURT: I have someone who traveled.

22 MR. MEISLER: Yes, he traveled from North
23 Carolina.

24 THE COURT: Okay. I think it's fair.

25 Let's get the evidence in with respect to the

1 KEIP. I'm not going to hear argument tonight, but let's get
2 the evidence in.

3 And my schedule is fairly open this week and next
4 week on a relative scale. There are a lot of people in the
5 room who I know probably have other commitments, so I would
6 like everyone to take a look at your calendar.

7 Tomorrow, I'm not available -- I have a disclosure
8 statement hearing in another case -- I haven't read it yet.
9 But I'm open Thursday morning. I'm open all day Friday. I'm
10 open Monday. I've got a meeting at 3:00.

11 But if I had to miss it -- could I miss it, Ms.
12 Good, or no?

13 (No verbal response)

14 THE COURT: Okay. I prefer not, but -- and I have
15 no idea what I have in Blackhawk, but it can't be anything on
16 Tuesday -- I think Tuesday is pretty open all day.

17 This is unusual. I've got everything crammed into
18 March. My March is a disaster, but my February is pretty
19 open. Almost anything next week works.

20 We can't put this off because we have a process
21 going, so I understand that. So, I prefer to take it up
22 again this week, if possible, but I will -- we're going to
23 take five minutes. You all talk.

24 I will hear the witness tonight.

25 Brandon, are you good?

1 THE COURT REPORTER: Yes.

2 THE COURT: I'll hear the witness tonight.

3 Do you need more than five minutes?

4 UNIDENTIFIED: No.

5 THE COURT: Okay. And then we're going to call it
6 a night.

7 Do you need 10 minutes? Do you need to regroup
8 maybe? Why don't I give you -- I don't know who it is -- why
9 don't I give you 10. You can regroup, you can talk, the
10 witness can get his or her head in the space and we'll go.

11 We're in recess.

12 (Recess taken at 6:27 p.m.)

13 (Proceedings resumed at 6:51 p.m.)

14 THE COURT OFFICER: All rise.

15 THE COURT: Thank you. Please be seated.

16 Okay. Counsel, during the break I looked up the
17 iPic transcript. It's Case 19-11739. It's the transcript
18 from the September 17th, 2019, hearing; it's Docket Item 294.

19 It gives you recent thoughts. I had cash
20 collateral/DIP financing issues in two cases at the same
21 time. I had reason to go back and look at things.
22 Obviously, and as it says in the transcript, it's a case-by-
23 case basis, but nonetheless, you'll get some of my thoughts
24 and specific thoughts on that particular case, but more
25 general thoughts.

1 Okay.

2 MR. MEISLER: Okay. Your Honor, for the record,
3 Ron Meisler of Skadden Arps on behalf of the debtors.

4 Your Honor, we caucused amongst the various
5 advisors and what we'd like to do is we would try -- we would
6 like to try to take your time on Thursday and on Friday and
7 see if we can make use of the day tomorrow amongst ourselves
8 to see if we can't settle our disputes.

9 THE COURT: That makes sense.

10 MR. MARTIN: On Thursday, actually, we cannot --

11 MR. MEISLER: Oh, Thursday, you're still --

12 MR. MARTIN: Yeah.

13 MR. MEISLER: -- you're still going to figure your
14 schedule out, but if we can use Thursday, right, then we'll
15 use it?

16 MR. MARTIN: I have a trial on Tuesday in front of
17 Judge Wiles and Thursday all my witnesses are coming in, so I
18 thought we were going to go with Friday, so I didn't try to
19 move them. Let me just see if I can --

20 THE COURT: Okay. You'll let me know. My day is
21 free on Thursday. You'll let us know.

22 If Mr. Martin can't be here, then we'll go with
23 Friday and you'll have two days to try to figure it out.

24 MR. MEISLER: That's right, right.

25 THE COURT: And the only -- I've got something at

1 9:45 on Thursday morning. I think that goes away. I have my
2 2:30 Chapter 7 day that should be short, but we'll be taking
3 a break then. Other than that, Thursday is free and Friday
4 is wide open.

5 So, let's start -- if we're doing Thursday --
6 excuse me -- if we're doing Thursday, let's start at 10:00.

7 MR. MEISLER: Terrific, Your Honor.

8 And, Your Honor, just so the Court is aware,
9 unfortunately for me, on Friday I have a family function for
10 a nephew whose bar mitzvah is in Illinois --

11 THE COURT: Mazel tov.

12 MR. MEISLER: Thank you.

13 -- and so, therefore, I won't be able to make it
14 on Friday, but between Mr. Dressel, Mr. Hogan, and the --

15 THE COURT: You are well-covered.

16 MR. MEISLER: Exactly right. So, I will not stop
17 the show.

18 THE COURT: Thank you.

19 MR. MEISLER: So, Your Honor, with that, we will
20 be in touch with your chambers and we'll sort out finalizing
21 schedules.

22 THE COURT: Thank you.

23 MR. MEISLER: Terrific.

24 Your Honor, with that, before I jump into the
25 KEIP, I thought I was at the cusp of settling up with Vatera

1 and their objection to the KEIP --

2 UNIDENTIFIED SPEAKER: (Indiscernible.)

3 MR. MEISLER: -- we couldn't get there.

4 Okay. Unfortunately --

5 THE COURT: Well, we'll hear the evidence. I'm
6 not giving up hope that over the next two days you could
7 solve that problem with Vatera.

8 MR. MEISLER: Your Honor, I share your optimism.

9 THE COURT: Mr. Galardi agrees it's possible --
10 anything is possible.

11 MR. GALARDI: Your Honor, I would agree.

12 THE COURT: Anything is possible. Uh-huh.

13 MR. GALARDI: I'll do my best.

14 MR. MEISLER: Yes. We have an open line of
15 communication. Mr. Galardi and I have known each other for a
16 very long time, so that dialogue is moving along smoothly.

17 MR. GALARDI: (Indiscernible.)

18 MR. MEISLER: And the same, of course, with
19 Mr. Bromley, and Mr. Martin and I are just getting to know
20 each other, but doing --

21 THE COURT: I've known Mr. Martin a long time,
22 too.

23 MR. MEISLER: Terrific.

24 Okay. So, let's move to KEIP the we're only here,
25 actually, to admit evidence --

1 THE COURT: Yes.

2 MR. MEISLER: -- on account of the declaration of
3 David Gill.

4 We have other declarants here -- Mr. Dempsey and
5 Mr. Milligan -- but both will be here whether we resume on
6 Thursday or Friday. So, in light of the hour, Your Honor, if
7 you prefer, we would delay on working the other two into
8 evidence.

9 THE COURT: Well, let's start with the first
10 witness. Let's see where we are, but, yes.

11 MR. MEISLER: Terrific.

12 THE COURT: We're going with whom?

13 MR. MEISLER: Mr. Gill, Your Honor. It's the
14 chairman of the board.

15 And there is an unfortunate housekeeping matter.
16 When our redacted copy of Mr. Gill's declaration was filed,
17 apparently there may have been something filed that discloses
18 a participant to the KEIP that shouldn't have been disclosed.
19 I'm slightly confused as to what got filed how, because,
20 apparently, in one version it was redacted correctly and in
21 another version it was not redacted correctly.

22 What we'd like to do -- and the U.S. Trustee has
23 told me that filing an errata sheet might not be the right
24 terminology --

25 THE COURT: Okay.

1 MR. MEISLER: -- but the concept is that we would
2 like to have the Clerk of the Court withdraw what was filed
3 and we would refile the corrected --

4 THE COURT: Yes. You need to get the picture
5 image taken off and put your new one on --

6 MR. MEISLER: Correct.

7 THE COURT: -- however they do that -- I don't
8 know -- but that's what you need to happen.

9 MR. MEISLER: Terrific.

10 And, of course, everyone's rights are reserved to
11 object --

12 THE COURT: With respect to the motion to file
13 under seal.

14 MR. MEISLER: Exactly.

15 THE COURT: Yes?

16 MS. RICHENDERFER: Yes, Your Honor. I just wanted
17 to make that clear -- Linda Richenderfer from United States
18 Trustee's Office -- as I pointed out earlier to Mr. Meisler,
19 it is Docket Number 174, where I believe they meant to redact
20 bullet point number two on Page 5 and, instead, redacted what
21 was underneath it.

22 It has been on the docket now since the 24th of
23 January -- I have some concerns about that -- but in light of
24 just getting this --

25 THE COURT: We'll deal with it.

1 MS. RICHENDERFER: -- as long as I explained to
2 him that having worked with the Clerk's Office before, there
3 is a process to get this done; it's just not merely asking
4 them, it's just not an errata sheet. There's a full and
5 complete process.

6 THE COURT: Yeah, I don't know what that is.

7 MS. RICHENDERFER: But reserving all of my rights
8 to argue with respect to whether it should be sealed in the
9 first place.

10 THE COURT: Yes.

11 MR. MEISLER: Exactly.

12 Your Honor, I readily admit I do not know either
13 what the exact process is, but we will get it down and we
14 will do it right.

15 Okay. Your Honor, that moves to the matter of
16 substance, which is admitting the declaration of Mr. David
17 Gill into evidence. Your Honor, Mr. David Gill is chairman
18 of the board and his testimony is in support of the Key
19 Employee Incentive Plan that the Board adopted.

20 Your Honor, I don't want to take up too much time,
21 so if you want me to give some background I will; if not, we
22 could just move right forward and we can, if there's no
23 objection to admitting this into evidence, then we can move
24 right into cross.

25 THE COURT: We're going to go right to evidence.

1 Is there any objection to the admission of Mr.
2 Gill's declaration?

3 COUNSEL: No objection, Your Honor.

4 THE COURT: It's admitted.

5 (Gill Declaration received in evidence)

6 MR. GALARDI: I'm sorry, Your Honor -- one
7 moment -- we're going to try to shorten the testimony.

8 (Participants confer)

9 MR. MEISLER: Your Honor, we just cut a little bit
10 of cross time. Your Honor -- Mr. Galardi has asked, and I
11 readily accept his request -- we would like to proffer
12 testimony for two facts.

13 One -- and this would be the testimony of
14 Mr. David Gill. I know he knows these facts; he and I have
15 spent many times in board meetings and board calls -- the CEO
16 and the CFO did not receive retention payments. So, that's
17 point number one.

18 Point number two, at target value -- and I'm not
19 disclosing the number because that was redacted, and, again,
20 that's an issue for another day -- but that target value, the
21 Board believes that there should be a recovery for unsecured
22 creditors.

23 Obviously, Your Honor, there are variables and
24 assumptions in there that the cost of the case would have an
25 impact, but the Board did review something and came to the

1 thoughtful conclusion, based on consultation of advisors,
2 that at the target, there should be a recovery for unsecured
3 creditors.

4 THE COURT: Okay.

5 MR. GALARDI: And, Your Honor, just so everybody
6 is following with me, because I know that's not often,
7 Paragraph 15, the second sentence of it is why I want to
8 be -- because it says, "Begin to receive the target
9 value ..." and I just want it to be clear what that meant.

10 Now, there's no guaranties about the amount,
11 but --

12 THE COURT: Paragraph 15 of what?

13 MR. GALARDI: I'm sorry, the -- that's their
14 motion.

15 THE COURT: Of the motion?

16 MR. GALARDI: Yeah. I have an unredacted version.
17 It was really Paragraph 15 of the motion, I'm sorry.

18 THE COURT: Okay.

19 MR. MEISLER: Okay. Your Honor, without fewer
20 adieu and not hearing any objection from any of my colleagues
21 to admit Mr. Gill's declaration into evidence, I would ask
22 the Court if Mr. Gill's declaration could be admitted into
23 evidence.

24 THE COURT: I admitted that.

25 MR. MEISLER: Thank you, Your Honor.

1 THE COURT: Any cross?

2 MS. PARISI: Yes, Your Honor.

3 THE COURT: Okay. Mr. Gill, could you take the
4 stand, please.

5 THE CLERK: Raise your right hand.

6 DAVID GILL, DEBTORS' WITNESS, SWORN

7 THE WITNESS: I will.

8 THE CLERK: Please state your full name and spell
9 your last name for the record.

10 THE WITNESS: David Gill, G-I-L-L.

11 THE CLERK: All right. You may be seated.

12 THE COURT: You can proceed.

13 CROSS-EXAMINATION

14 BY MS. PARISI:

15 Q Thank you, Mr. McGill -- Mr. Gill -- excuse me.

16 A We dropped the M-C a long time ago.

17 (Laughter)

18 BY MS. PARISI:

19 Q Yes -- apologies. It's late.

20 Rachel Parisi, again, on behalf of the committee. Thank you
21 for taking the stand. Just a couple questions.

22 In your declaration, one of the statements you've made
23 is:

24 "I was involved in structuring the KEIP so as to align
25 with the company's goal to maximize value for the debtors'

1 estates."

2 Correct?

3 A That's correct.

4 Q And as part of that evaluation, did you evaluate
5 potential recoveries for Deerfield as a secured creditor?

6 A No, not in particular. We had several goals, of
7 course, and our goal was to maximize value in total and then
8 there's obviously some people are secured and some are
9 unsecured and that will take care of itself, but our goals
10 were to incentivize the management team to maximize the value
11 of the sales process.

12 Q So, for all constituents?

13 A Absolutely.

14 Q So, at the -- and I'm going to use these phrases -- so,
15 at the threshold level, unsecured creditors get zero?

16 A That's my expectation, yes.

17 Q And at the turning point value, unsecured creditors get
18 zero?

19 A Most likely.

20 Q And at the target value, is there any anticipated
21 recovery for unsecureds?

22 A Yes, they should start to participate before that, yes.

23 Q Based on what you assessed, is it your belief that
24 payments to key participants at the target value would
25 eclipse any estimated recovery to unsecureds?

1 A No, I don't think I would agree -- you said at the
2 target value. My recollection is that the total KEIP
3 payments for that are about two and a half million dollars
4 and I would hope the unsecureds would do better than that.

5 Q Hope the unsecureds, but you don't have any data that
6 would support that or you did not evaluate any data that
7 would support that?

8 A You know, it's a math exercise. I just said I would
9 expect it to be greater than the amount of the KEIP.

10 Q Our math at the target value would show an estimated
11 recovery to unsecureds at \$365,000.

12 Would you disagree with that number?

13 MR. HOGAN: Objection, Judge. She's asking him to
14 guess about (indiscernible) and that's not (indiscernible.)

15 MS. PARISI: I'm just asking if Mr. Gill would
16 disagree with that.

17 THE COURT: You can answer if you know the answer.

18 THE WITNESS: I'm not going to fashion a guess.

19 I'd ask that you check your math on the KEIP, because I
20 noticed this morning reading your objections that you had the
21 wrong numbers in there for the KEIP payments. So, you need
22 to fix that first before you can determine whether your
23 300,000 or whatever it was, is correct.

24 BY MS. PARISI:

25 Q And I guess without disclosing numbers, because we're

1 not disclosing numbers, which -- at the threshold level,
2 turning point, target, or max --

3 A I think it was turning point and target; your numbers
4 didn't agree to ours and yours were higher.

5 Q So, at the threshold level the debtors' motion provides
6 that that would be -- and I'm sorry, I'm bouncing around
7 between redacted versions and non-redacted versions, so I
8 apologize -- so, in the motion, the threshold value is stated
9 as the value of the plan sale to lenders under the debtors'
10 prepetition credit agreement.

11 And you were here for the testimony earlier today; is
12 that correct?

13 A Sure.

14 Q So, would that value be 140 million or 142 million or
15 some other number?

16 A The threshold is 140.

17 Q One hundred and forty.

18 In your involvement in structuring the KEIP, was there
19 any consideration of measuring the KEIP based on any other
20 metrics besides what I'll call "transaction value"?

21 A No. I mean, that's the driver. That's the whole point
22 of the incentive.

23 Q So, there was no consideration whatsoever as to whether
24 the KEIP should be evaluated based on any potential
25 distributions to unsecured creditors in the case?

1 A No. Again, the goal is to maximize the total value of
2 the assets and the rest will take care of itself, based on
3 who has security and who doesn't.

4 Q At the threshold level, the prepetition RSA that was
5 negotiated, that, essentially, would be the deal that would
6 have to get to closing in order for the threshold level to be
7 met?

8 A That's my understanding.

9 MS. PARISI: I think that's it, Your Honor.

10 THE COURT: Thank you.

11 MS. PARISI: Thank you.

12 THE COURT: Any further cross?

13 MR. GALARDI: Your Honor, based on what I heard,
14 I'm withdrawing the objection.

15 THE COURT: Thank you.

16 Ms. Richenderfer, I don't remember if you objected
17 to this, as well. I think you did.

18 MS. RICHENDERFER: I did file an objection, but I
19 have no questions for this witness.

20 THE COURT: Thank you.

21 Any redirect?

22 MR. HOGAN: No, Judge.

23 THE COURT: Thank you.

24 THE WITNESS: Thank you.

25 THE COURT: Mr. Gill, you may step down.

1 (Witness excused)

2 THE COURT: Who are the other witnesses? I know
3 we have Mr. Dempsey's declaration.

4 MR. MEISLER: Your Honor, we've got Mr. Dempsey as
5 our market expert, as our compensation consultant, and
6 compensation expert, and we also have Mr. Milligan, the chief
7 financial officer, where we're looking for certain parts of
8 his first day declaration in support of the KEIP in a fairly
9 limited fashion.

10 Again, happy to do that tonight, although, in
11 light of the hour, they're available -- Mr. Milligan,
12 unfortunately for him, he's definitely coming along with us.

13 THE COURT: Right. But not Mr. Dempsey.
14 Where's he traveling from?

15 MR. MEISLER: Mr. Dempsey is traveling from the
16 great city of Chicago.

17 THE COURT: The great city of Chicago.

18 MR. MEISLER: And Mr. Dempsey is available to
19 travel if we need him, but at the same time, I bet
20 Mr. Dempsey wouldn't be unhappy about being up tonight and
21 being admitted into evidence.

22 THE COURT: Thoughts on how long his cross is
23 going to take?

24 UNIDENTIFIED: (Indiscernible), Your Honor, I --

25 THE COURT: You're gone.

1 MS. PARISI: I don't think I have any cross for
2 Mr. Dempsey.

3 THE COURT: Oh. Ms. Richenderfer, are you going
4 to have cross for Mr. Dempsey?

5 MS. RICHENDERFER: No, Your Honor. I think the
6 issue with Mr. Dempsey's declaration is the same as the issue
7 with the motions, to which portions should be sealed, but I
8 have no cross-examination for him.

9 THE COURT: Okay.

10 MR. MEISLER: Terrific.

11 THE COURT: I assume there's no objection to
12 Mr. Dempsey's declaration coming into evidence?

13 MS. PARISI: No objection.

14 MS. RICHENDERFER: No objection.

15 THE COURT: It's admitted.

16 (Dempsey Declaration received in evidence)

17 MR. MEISLER: Thank you, Your Honor.

18 THE COURT: Mr. Dempsey, you can remain in the
19 great city of Chicago.

20 MR. DEMPSEY: Thank you, Your Honor.

21 MR. MEISLER: Thank you, Your Honor.

22 So, with that, I think we adjourn the KEIP motion.

23 THE COURT: Mr. Milligan is going to have to be
24 here in any event, I'm assuming.

25 MR. MEISLER: Unfortunately.

1 THE COURT: How about how much cross-examination
2 do we have for Mr. Milligan?

3 (Participants confer)

4 MS. RICHENDERFER: Your Honor, I think there's
5 some confusion. (Indiscernible), it's from the first day
6 declaration. I'm not sure, again, as to what portions
7 they're offering for the KEIP.

8 THE COURT: Okay. Let's find that out.

9 MR. MEISLER: Let's see where Mr. Milligan plays a
10 role, because maybe we could do without it.

11 (Participants confer)

12 MR. MEISLER: So, Your Honor, the reason why we
13 used the Milligan declaration in the first day order is for
14 purposes of supporting the prepetition marketing process.
15 That there was a nearly hundred-day prepetition marketing
16 process. That is the only reason why we used the Milligan
17 declaration.

18 THE COURT: Okay. You're going to use it in
19 connection with the KEIP?

20 MR. MEISLER: That's right, Your Honor.

21 A very limited basis. I think it's --

22 THE COURT: Do we know what paragraphs it is?

23 MR. MEISLER: I feel like it's Paragraph 114; is
24 that right?

25 I'm hearing it's 105.

1 (Participants confer)

2 MS. RICHENDERFER: Your Honor, if I may?

3 Paragraph 105 references, at least, (indiscernible)

4 Mr. Milligan's first day declaration.

5 MR. MEISLER: I'm sorry?

6 MS. RICHENDERFER: Paragraph 105 references the

7 KEIP.

8 MR. MEISLER: 105 does reference the KEIP, that's

9 correct.

10 And, Your Honor, there is a paragraph that simply
11 goes to the point of the marketing, the period of time of
12 prepetition marketing. Where exactly that is, I'd have to
13 look.

14 MS. RICHENDERFER: Your Honor, I have no
15 objection.

16 MR. MEISLER: And with that, Your Honor, I would
17 close the evidentiary record.

18 THE COURT: Well, I need to make sure we know
19 what's being put in and if there's going to be any cross.

20 MS. RICHENDERFER: Your Honor, I actually have no
21 objection to any portion of Mr. Milligan's first day
22 declaration being put into evidence for the KEIP and I have
23 no cross-examination.

24 THE COURT: Okay.

25 MS. PARISI: No cross, Your Honor.

1 THE COURT: Okay. Then, we're going to put in the
2 declaration, but I would like to know when we reconvene what
3 paragraph.

4 MR. MEISLER: I have it, Your Honor.

5 THE COURT: Oh, okay.

6 MR. MEISLER: 56 through 58.

7 THE COURT: Okay.

8 MS. RICHENDERFER: No objection, Your Honor.

9 I think this is basically what his declaration
10 also says and what his prior testimony was in bidding
11 procedures.

12 THE COURT: Okay.

13 MR. MEISLER: Your Honor, I'm getting the sense
14 that we may, if Your Honor is willing, that maybe we just go
15 forward to push the KEIP forward if that works for Your
16 Honor?

17 THE COURT: Okay. Let's hear argument.

18 MR. MEISLER: It sounds to me like we will be able
19 to quickly get through it.

20 THE COURT: So, I'm closing the evidentiary
21 record.

22 Does -- the committee has no evidence --
23 affirmative evidence?

24 MS. PARISI: Correct, Your Honor.

25 THE COURT: Okay. And Ms. Richenderfer, no --

1 nothing affirmative to put on?

2 MS. RICHENDERFER: That's correct, Your Honor.

3 THE COURT: Thank you.

4 The record is closed.

5 MR. MEISLER: Okay. Thank you, Your Honor.

6 I will cede the podium to Ms. Parisi for
7 creditors' committee.

8 THE COURT: Let's hear the objections, what the
9 remaining objections are.

10 MS. PARISI: And thank you, Your Honor. I will
11 make this quite brief.

12 After sitting through today, the committee
13 recognized there are lots of battles to fight in this case,
14 and we did -- while we did propose what we thought were some
15 modest tweaks to the KEIP prior to coming to the hearing that
16 were not accepted, we do generally -- we are generally
17 supportive of the KEIP, in principle, in this case, and so
18 notwithstanding that our -- that what we believe to be our
19 minor tweaks were not accepted, at this time, the committee
20 is going to withdraw its objection.

21 THE COURT: Thank you.

22 MS. RICHENDERFER: Your Honor, Linda Richenderfer
23 for the U.S. Trustee's Office.

24 With respect to the KEIP, I believe for the most
25 part my objection was limited to one issue and that is -- if

1 not, this is the only issue I'm going to be pressing
2 forward -- which is the fact that the precedent of making
3 payments, KEIP payments with respect to a deal that's already
4 on the table that's being brought into the Bankruptcy Court
5 is what the U.S. Trustee is concerned with here and it sets a
6 certain precedent.

7 I understand that there's roads to be traveled in
8 order to get to the final deal, but that's always the case no
9 matter what the schedule is of the payment. You've still got
10 to get through the auction process, the sale process, and you
11 still have to close at the end of the day. So, that is the
12 concern that my office has with respect to this particular
13 KEIP.

14 THE COURT: Thank you.

15 MR. MEISLER: Thank you, Your Honor.

16 A little unknown secret, this tie is my lucky tie
17 and having --

18 (Laughter)

19 THE COURT: Do you want to pass it off to someone
20 for the next hearing since you're not going to be here?

21 (Laughter)

22 MR. MEISLER: I think so. I think I'm going to
23 contribute it to Mr. Dressel.

24 And having Mr. Galardi and Ms. Parisi withdraw
25 their objections all in the course of approximately six and a

1 half minutes is a record for me and I give all credit to my
2 tie.

3 So, Your Honor, I would like to address the U.S.
4 Trustee's objection. I understand the objection. Many times
5 in this situation when I have a bid in hand, I don't ask for
6 an award for closing that.

7 This one, though, is different. This is one, Your
8 Honor, where we have marketed the business for nearly 100
9 days prepetition. The management team -- I think you heard
10 how many documents are in the data room, you've heard how
11 many questions have been answered -- the management team, and
12 in this instance, with that one data point where each of the
13 CEO and CFO -- and this is public -- that they get an award
14 of \$100,000 for closing the transaction.

15 And we hope that they do better than that. That's
16 what the KEIP is meant to do. We're incentivizing our
17 management team to do better.

18 But if they close the Deerfield stalking horse
19 bid, what you've seen in this room is a slice of what has
20 gone on, not just with the people in this room who, of
21 course, the creditors' committee is a new entrant, but we
22 have had very difficult negotiations with our secured lender
23 and we arrived at a plan construct which does create things
24 for stakeholders. We've talked about it -- it pays admin
25 creditors, it pays priority claims, it ensures that employees

1 with priority claims that are no longer with the company,
2 that they will get paid their \$13,600, notwithstanding the
3 employee wages motion, because the ones that are not with us,
4 there's all sorts of things where they're not included in the
5 employee wages motion. They're going to have to file a proof
6 of claim in accordance with the bar date and they're -- under
7 the Deerfield bid, they're going to get \$13,650, of course,
8 up to the amount of their claim.

9 Now, the Deerfield stalking horse bid, it's got
10 various covenants to it. There's risks to closing it, and
11 not only the covenants, but we've got to confirm the plan.

12 Now, I'm sure as we get into auction, Mr. Galardi
13 and Mr. Porzio or Mr. Martin --

14 UNIDENTIFIED: Mr. Porzio.

15 MR. MEISLER: You're now a named partner.

16 UNIDENTIFIED: (Indiscernible.)

17 (Laughter)

18 MR. MEISLER: I wish.

19 Mr. Martin is going to say, Oh, that's very risky,
20 so maybe we should pick a different bid.

21 Well, we'll get to that, but the core is that
22 there are risks to closing the Deerfield bid and, Your Honor,
23 I think you've recognized -- yes, we looked at Bumble Bee --
24 we looked at lots of other KEIPs and we looked, also, at the
25 Aralez case with Judge Glenn -- the KEIP is supposed to be

1 primarily incentivizing, but the fact that it might have some
2 retentive aspect to it, it doesn't nullify the opportunity or
3 the merit of approving the KEIP as long as it's primarily
4 incentivizing.

5 And we believe that closing on the Deerfield bid
6 has risks and it will be difficult and for that reason, we
7 think it is appropriate that Ms. Sanfilippo and Mr. Milligan
8 be rewarded for doing more than just their job on a day-to-
9 day basis because they've got dozens, if not hundreds of
10 diligence questions that await them from now until the bid
11 deadline.

12 Your Honor, as we go further -- and I don't think
13 anything is objecting any further to awards at the turning
14 point or awards at the target -- but I do want to make a
15 mention that we started thinking about the KEIP in August of
16 2019. It was in the form of an incentive plan when we didn't
17 know where we were going, but we did start thinking about it.

18 The Board has spent a lot of time with Mr. Dempsey
19 thinking about what would be an appropriate incentive
20 compensation program to motivate the seven participants so
21 that we can drive the best outcome.

22 And so, if we think about a business judgment
23 standard -- and I'm tying that together with 503(c)(3),
24 because I think most courts look at 503(c)(3) and as business
25 judgment standard -- they were well-informed, they spent a

1 lot of time with Mr. Dempsey, they spent a lot of time with
2 counsel -- that would include me. I have personally seen
3 many, many KEIPs -- not nearly as many as Mr. Dempsey -- and
4 they got advice from the both of us.

5 There was a compensation committee on the Board
6 that debated it, spent a lot of time thinking about how to
7 drive the right behaviors. The compensation committee then
8 reviewed it and recommended it to the larger board. The
9 larger board discussed it -- again, this is over a three-
10 month period. We started the process with John Dempsey in
11 the end of August and we didn't approve it until
12 December 27th and we had multiple meetings to talk about the
13 KEIP and what the KEIP structure should be and where the
14 metrics should be. And so, when it comes to duty of care,
15 well, they satisfied that, Your Honor.

16 And when it comes to duty of loyalty, there's
17 nobody in the KEIP that was part of the decision-making
18 process. Ms. Sanfilippo is a member of the Board, but
19 anytime we talked about the KEIP, Ms. Sanfilippo recused
20 herself. So, Your Honor, since we have no issue of duty of
21 loyalty, Your Honor, I think we clearly satisfy the business
22 judgment standard.

23 Your Honor, if you were to look at -- and I know
24 that some courts do look at a KEIP under the O'Brien
25 standard -- and then you're using a standard that thinks

1 about or analyzes it as an administrative claim. Your Honor,
2 I think we satisfy that standard, too, because that standard
3 is whether or not it brings value to the estate or is it
4 necessary to preserve the value of the estate -- we think it
5 is.

6 Your Honor, we think that these targets, we think
7 that these awards are motivating the seven KEIP participants
8 who are the most important people to driving values. We
9 think that by giving them the incentives that Mr. Dempsey and
10 the Board have determined are the appropriate marks, we
11 believe that that is going to drive bidders to get to the
12 auction and drive a better bid. And if they accomplish that,
13 then they get their rewards.

14 Your Honor, I think also in light of the hour, I
15 am obviously available for questions, but I think I've put on
16 the case that I was looking to put on, even if it's
17 abbreviated; again, just recognizing everyone's time and the
18 hour.

19 THE COURT: Thank you.

20 MR. MEISLER: Thank you, Your Honor.

21 THE COURT: Okay. Well, I will rule and I will
22 approve the KEIP.

23 The only remaining objection is out of the Office
24 of the United States Trustee -- and I don't say that in a
25 pejorative way, that it's the only one -- but it's the sole

1 remaining objection. And I think on the facts of this case,
2 it is appropriate to award the KEIP, even in the circumstance
3 where the threshold value for the KEIP is in closing the
4 current deal.

5 Based on the testimony that's been admitted,
6 including the declarations of -- well, the testimony of
7 Mr. Gill, the declaration of Mr. Gill, the declaration of
8 Mr. Dempsey, and the several paragraphs of the Milligan
9 declaration, I think there is a sufficient evidentiary basis
10 to find that under 503(c)(3), the plan is primarily
11 incentivizing and not retentive in nature.

12 It's primarily incentivizing because the metric
13 that is being used is maximization of value and the greater
14 the auction proceeds, whether that comes in terms of a 363
15 sale or through the plan, the greater the incentive. And the
16 maximization of value is an appropriate incentivizing metric
17 for purposes of this case. And I will note that the bulk of
18 the payment is payment for going beyond the threshold level.

19 The testimony also was that it will take work to
20 close the current deal on the table and Judge Sontchi, I
21 believe, has held that that is appropriate in a given case,
22 and I find that this is such a case.

23 What was submitted also shows that these seven
24 people do have an ability to affect the outcome of the
25 auction. They are the people who bidders will look to for

1 information. So, the metric is something that they can
2 influence and that testimony is unrebutted and that is, to
3 me, an important factor, among all the Dana factors that are
4 out there.

5 The debtors have advice from not only their own
6 counsel; they have Mr. Dempsey's advice. It is unrebutted.
7 It details, through his experience at Mercer, which is a
8 preeminent compensation firm, that this KEIP was designed to
9 be incentivizing and I so find that it is.

10 So, that concludes that ruling. It could have
11 been better spoken, but I think it serves the --

12 MR. MEISLER: Thank you, Your Honor.

13 I would suggest in the redaction, we can revisit
14 that when we reopen the hearing on Thursday or Friday.

15 THE COURT: That's fine.

16 Ms. Richenderfer, are you going to be here?

17 MS. RICHENDERFER: Yes, Your Honor.

18 THE COURT: Okay. That's fine.

19 Let me also observe that the committee withdrew
20 its objection and said that people need to pick their
21 battles -- I appreciate that -- and I think that is very
22 true. And whatever battles there need to be had, we will
23 have, but let's pick them appropriately. Thank you.

24 MR. MEISLER: Thank you, Your Honor.

25 THE COURT: Okay. So, that's going to conclude

1 tonight or what else do we have?

2 Mr. Martin?

3 MR. MEISLER: Your Honor, I believe, at least from
4 the debtors' perspective, that concludes this evening. We'll
5 be in touch with chambers and finalize schedules as soon as
6 we coordinate amongst ourselves.

7 I'd turn to --

8 THE COURT: Anything from anyone else?

9 MR. MARTIN: Yeah, I just want to -- Thursday is
10 not looking good in terms of moving all these witnesses who
11 are coming in from out of town and Ms. Parisi is on her feet
12 in a sale hearing up in Newark. So, if we could, we'd like
13 to -- and hope that we can, by the way, use the time
14 nonetheless to come together -- but we'll look towards
15 Friday.

16 MR. MEISLER: Your Honor, my tie will be around
17 Mr. Dressel's neck and we will proceed on Friday without me.

18 THE COURT: Okay. Thank you very much.

19 MS. RICHENDERFER: Your Honor, what time on
20 Friday?

21 THE COURT: Let's start at 9:30.

22 MS. RICHENDERFER: Thank you, Your Honor.

23 MR. MEISLER: Thank you, Your Honor.

24 THE COURT: Thank you. We're adjourned.

25 (Proceedings concluded at 7:30 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajackowski
Mary Zajackowski, CET**D-531

January 29, 2020